United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,175

LOCAL LODGE NO. 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Request to Enforce an Order of the National Labor Relations Board

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JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 15,175

LOCAL LODGE No. 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Prehearing Conference Stipulation

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, hereby stipulate and agree as follows with respect to the issues, the procedure, and the dates for the filing of the briefs and joint appendix herein.

I. THE ISSUES

1. Whether the Board properly found that petitioner, in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, maintained and enforced a provision in its collective bargaining agreement with the Electric Auto-Lite Company pertaining to the seniority of employees who leave the bargaining unit.

2. Whether the Board properly found that petitioner caused the Electric Auto-Lite Company to deny Cecil Frazier a transfer back into the bargaining unit in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

3. Whether the Board's order is valid and proper (including but not limited to the questions whether the cease-and-desist and notice-posting provisions have been rendered moot).

II. THE JOINT APPENDIX

A. The portions of the record to be printed shall be embodied in a Joint Appendix. Petitioner shall serve its des-

ignation of the contents of the Joint Appendix on or before October 1, 1959, and respondent shall serve its counter-designation on October 8, 1959.

B. Each party shall bear the expense of printing in the Joint Appendix the portions of the record designated by it. Petitioner shall include in its designation and bear the expense of printing the Board's Decision and Order, the Intermediate Report of the Trial Examiner, this stipulation, and this Court's order thereon.

C. It is further agreed that any party and the Court, in the briefs and at and following the hearing in the case, may refer to any portion of the original transcript of record herein which has not been printed, to the same extent and effect as if such portions of the transcript had been printed or otherwise reproduced, it being understood that any portions of the record thus referred to will be printed in a supplemental Joint Appendix if the Court directs the same to be printed.

III. Filing of Briefs

Petitioner will file its brief and the Joint Appendix in this Court on or before October 30, 1959. Respondent's brief will be due November 30, 1959, and petitioner's reply brief, if any, will be due December 15, 1959. In lieu of filing and serving printed briefs on the designated dates, any party may on that date serve a typewritten copy of its brief with printed copies to be filed and served within ten days thereafter.

/s/ Bernard Dunau
Bernard Dunau
Counsel for Petitioner

Washington, D. C.
August 20, 1959.

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Counsel for Respondent

Washington, D. C.
August 24, 1959

Order

Upon consideration of the prehearing stipulation submitted by petitioner and respondent, it is

ORDERED that the prehearing stipulation is approved and that the Clerk is directed to file it.

It is FURTHER ORDERED that the prehearing stipulation shall be printed in the joint appendix and shall control further proceedings in this case unless modified by further order of the court.

Dated: August 27, 1959 Recd 8/28/59

Decision and Order

On January 6, 1959, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings by the Trial Examiner at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications noted below.

The Trial Examiner found that the seniority provisions of the 1955 contract between Respondent and the Electric

Auto-Lite Company were invalid. While we agree with the Trial Examiner, we rely solely on the following facts. 123 N.L.R.B. No. 143 The contract in question did not contain a union-security clause requiring employees in the bargaining unit to become union members. It did, however, contain a maintenance of membership clause. The contract also contained a seniority clause providing for the retention and accumulation of seniority in the unit by only those employees transferred out of the unit who had applied for withdrawal cards from the Respondent. Because under the Respondents' constitution only union members are eligible to obtain withdrawal cards such a clause thereby discriminated in favor of union member employees.[1] We therefore find that the Respondent's maintenance and emforcement of this seniority provision violated Section 8 (b) (2) and (1) (A) of the Act.

As Frazier was denied a transfer back into the unit because of Respondent's maintenance and enforcement of this illegal contract provision, we agree with the Trial Examiner that Respondent caused the Company, in the performance of the contract, to discriminate against Frazier, and the Respondent thereby violated Sections 8 (b) (2) and (1) (A).[2]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Local 1417, International Association of Machin-

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[1] It is immaterial whether or not all employees in the unit were members of the union as the provision inherently encourages members to remain members. *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719, (C.A. 2), aff'd *sub nom. Radio Officer's Union, AFL* v. *N. L. R. B.*, 347 U.S. 17.

[2] We do not adopt the Trial Examiner's findings concerning the retroactive effect of the seniority provisions nor his equating a seniority clause with a union-security clause. Cf. *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521; *Ford Motor Co.* v. *Hoffman*, 345 U.S. 330.

ists, AFL-CIO, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Electric Auto-Lite Company, which unlawfully discriminate in regard to the acquisition, retention or restoration of seniority rights of employees of said Company;

(b) Causing, or attempting to cause, the aforenamed Company to discriminate against employees in violation of Section 8 (a) (3) of the Act;

(c) In any like or related manner restraining or coercing employees of the aforenamed Company in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which we find will effectuate the policies of the Act:

(a) Make whole Cecil Frazier for any loss of pay suffered by reason of Respondent's action in causing the Company to discriminate against him. Said loss of pay shall be for the period from March 31, 1958, the date of the discrimination, until such time on or before July 31, 1958, (the date of the closing of the Companys' plant) when Frazier would normally have been terminated, absent Respondent's unlawful conduct.

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to compute the amount of back pay due under the terms of this Order.

(c) Post at its offices copies of the Notice attached hereto and marked "Appendix".[3] Copies of said notice to be furnished by the Regional Director for the Fourteenth Region shall, after being duly signed by the Respondent's duly authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within ten (10) days from the date of this Order what steps it has taken to comply herewith.

Dated at Washington, D. C., May 13, 1959.

BOYD LEEDOM, *Chairman*
PHILIP RAY RODGERS, *Member*
JOSEPH ALTON JENKINS, *Member*
National Labor Relations Board

(SEAL)

APPENDIX

NOTICE

TO ALL MEMBERS OF LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

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[3] If this Order is enforced by a decree of the U. S. Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF A U. S. COURT OF APPEALS ENFORCING AN ORDER."

WE WILL NOT restrain or coerce employees of The Electric Auto-Lite Company in the exercise of rights guaranteed by Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause The Electric Auto-Lite Company to discriminate against its employees in regard to seniority or otherwise in violation of Section 8 (a) (3) of the Act.

WE WILL make whole CECIL FRAZIER for any loss of earnings he may have suffered as a result of the discrimination against him.

LOCAL 1417, INTERNATIONAL
ASSOCIATION OF MACHINISTS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

IR-491
Mt. Vernon, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 14-CB-574

LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

CECIL FRAZIER, an Individual

and

THE ELECTRIC AUTO-LITE COMPANY, MT. VERNON FOUNDRY DIVISION, Party to the Contract

Alvin F. Slaight, Esq., and *Daniel F. Gruender, Esq.*, for the General Counsel.

Plato Papps, Esq., Washington, D. C., and *Fred Carstens*, Grand Lodge Rep., St. Louis, Mo., for Respondent Union.

Before: *Ralph Winkler*, Trial Examiner.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon charges filed by Cecil Frazier, an individual, the General Counsel of the National Labor Relations Board issued a complaint dated August 26, 1958, against Respondent Local 1417, International Association of Machinists, AFL-CIO, herein called the Union, alleging that the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2) and Section 2 (6) and (7) of the Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act.

Respondent filed an answer denying the unfair labor practices alleged.

Pursuant to notice, a hearing was held on October 14, 1958, in Mt. Vernon, Illinois, before the undersigned Trial Examiner. The General Counsel and the Union were represented by counsel with opportunity to examine and cross-examine witnesses, to introduce relevant evidence, to present oral argument and thereafter to file briefs.

Upon the entire record in the case, and upon observation of the demeanor of witnesses, I make the following:

Findings of Fact

I. Respondent labor organization involved

Respondent Union is a labor organization within the meaning of Section 2 (5) of the Act. It represents or has represented employees of The Electric Auto-Lite Company, herein called the Company.

II. The business of the Company

The Company is an Ohio corporation with its principal office and place of business in Toledo, Ohio. At all times material here until July 1958, the Company operated a branch establishment designated as the Mt. Vernon Foundry Division and located at Mt. Vernon, Illinois, where it was engaged in the manufacture, sale, and distribution of castings and moldings. During a representative yearly period, the Company made interstate shipments exceeding a value of $50,000 from Mt. Vernon. I find that the Company is engaged in commerce within the meaning of the Act.

III. The unfair labor practices

The General Counsel contends that Respondent Union has violated the Act by maintaining a combination of certain union-security and seniority provisions in a 1955 contract with the Company and, also, by causing the Company

to apply said contract provisions to Cecil Frazier. It is relevant here to relate some contract details going back to 1946, when Frazier began working for the Company.

The Contract

In a series of contracts from 1946 until the last such agreement executed in 1955, which latter agreement was operative at material times in 1958, the Union has been recognized by the Company as exclusive bargaining representative for a unit of machinists, maintenance men and electricians,[1] but excluding checkers or timekeepers and other specified classifications. All of these contracts provided for maintenance-of-union membership, but without a union-shop requirement. The 1946 contract contained the following two provisions, among others:

Article V.

(a) Seniority of employees shall be in the department where employed, and will start on the date this Company took over the payroll. Seniority of employees shall be established and in effect immediately upon the making of this agreement. Seniority lists will be posted in January of each year and will be open for inspection and copy of same shall be furnished to the Chairman of the Union. Unless a written protest is made by men in active service within thirty (30) days from date of posting of seniority list, dates shown thereon will not thereafter be changed.

(b) When it becomes necessary to reduce the force, seniority as set forth in Paragraph (a) of this Article will govern, the men affected to take the rate of the job to which they are assigned. In the restoration of forces, senior laid-off men will be given preference in returning to service, . . . and shall be returned to their former position if possible.

[1] Later contracts had a somewhat broader coverage not material here.

Article X.

(a) Employees accepting position as foremen, or men assigned to special duties outside the scope of this agreement shall retain their seniority where they last held seniority rights. . . .

Article V (a) and (b), set forth above, was substantially carried over into all subsequent agreements. In 1952, Article X (a), above, was changed to its present form:

Article V.

(10) (a) Any employee who has been or who is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall retain and accumulate his departmental seniority but not job seniority, *providing he applied for a withdrawal card from the Union at the time he was promoted.* [Emphasis added.]

The International Constitution, binding on Respondent herein, provides in part as follows respecting withdrawal cards:

Sec. 18. Any member who leaves the trade because of illness, or obtains employment outside the trade or industry, or obtains a supervisory position above the rank of working foreman, or because of circumstances over which the member has no control is compelled, as a condition of employment, to join another labor organization, or enters the Armed Forces of the United States or Canada, and upon complying with the conditions hereinafter set forth, may be issued an honorary withdrawal card by and with the approval of the L. L. in which membership is held.

Application for withdrawal card, accompanied by a fee of 25¢, shall be made to the F. S. or S. T. of the L. L. who, after the application has been approved

by the L. L., shall issue same, bearing the L. L. seal on a form designated and supplied by the G. L.

No application will be granted until all fines, dues and special levies charged against the member have been paid in full to date of application.

Persons discontinuing their membership by accepting withdrawal cards will not be entitled to any benefits or permitted to attend meetings or participate in any of the business of the I.A.M. They shall not violate any of the laws or decisions of the G. L. or L. L. under penalty of having their withdrawal card cancelled.

Contract Contentions and Resolutions

The General Counsel urges various reasons for the alleged invalidity of Article V, (10) (a) of the 1955 contract set forth above, dealing with the accumulation of seniority by employees leaving the bargaining unit.

Adverting to the fact that only union members may obtain withdrawal cards, and in view of the fact that the contract did not have a union-shop provision, the General Counsel's first ground is that the clause thereby discriminates against nonmembers of the Union. The next claimed basis for invalidity is that a withdrawal card, as stated in the International Constitution, "will [not] be granted until all fines, dues and special levies charged against the member have been paid in full to date of application [for withdrawal card]" and that such conditions exceed the "periodic dues and initiation fees" prescribed in Section 8 (b) (2) and the second proviso to Section 8 (a) (3) of the Act. The third asserted basis[2] is that loss of seniority for union considerations is an "additional or supplementary" form of discrimination not permitted by Section 8 (b) (2) or 8 (a) (3) even though all statutory conditions are otherwise met. The General Counsel lastly contends

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[2] Citing *Krambo Food Stores, Inc.*, 106 NLRB 870, 876-879, and *Reading Tube Corp.*, 120 NLRB No. 206.

that it is unlawful to predicate seniority on union standing (the withdrawal card) during a period when an employee is outside the bargaining unit.

The first and second grounds urged by the General Counsel are, in my judgment, clearly meritorious, and I so find. Accordingly, it is unnecessary to consider the third and fourth grounds mentioned above. By being a party to the 1955 contract and thereby causing the Company to deny certain seniority benefits to nonmembers of the Union while granting such benefits (with resulting employment preferences) to union members and further causing the Company to grant such benefits only to those union members who have paid "all fines . . . and special levies," I find that Respondent has violated Section 8 (b) (1) (A) and (2) of the Act. *National Automotive Fibres, Inc.,* 121 NLRB No. 173; *The Electric Auto-Lite Company,* 92 NLRB 1073; *N. L. R. B.* v. *Local 803, Boilermakers,* 218 F. 2d 299 (C. A. 3), enforcing 107 NLRB 1011.

Cecil Frazier's Discrimination

The case of Cecil Frazier illustrates the operation of the contract clause discussed above. Frazier was a maintenance man in Respondent's bargaining unit and covered by its contract in 1946. For reasons of physical disability, Frazier was assigned to a timekeeper job outside the bargaining unit in January 1947, and he held such job or an equivalent one until March 1958. Frazier was a member of the Union in 1946 and paid membership dues until March 1947; he was dropped from membership in July 1947 for dues delinquency.

In February 1958, Company Assistant Operations Manager Wayne Bennett advised Roy Adams, chairman of the Union Shop Committee,[3] that Frazier's job was being abol-

[3] Respondent is an amalgamated local, made up of employees of several employers. Each group has its own Union Shop Committee to oversee, in the Union's behalf, the administration of Respondent's contracts with the respective employers and otherwise to handle the Union's day-to-day affairs with the employers.

ished for economic reasons and that the Company intended to transfer Frazier back to the Union's bargaining unit on the basis of his company seniority and thereby enable Frazier to bump a less senior employee in the unit. Adams told Bennett that Frazier had not obtained a union "withdrawal slip" on his transfer out of the unit in 1947, as specified in the 1955 contract, and hence was not (in 1958) a union member in good standing. Adams explained to Bennett that the other men would not work with Frazier because it would "necessitate laying off a man who had been paying dues for the past 10 or 12 years. . . . That wouldn't go over very well with the men especially the ones that were laid off." About this same time, Adams also informed Frazier that he, Frazier, could not return to the unit because he lacked a withdrawal card.

Bennett did not lay off Frazier, but instead transferred him to another timekeeper job also outside the unit. The Company then began reducing its plant personnel preliminary to a final shutdown of plant activities on July 31; and in March 1958, the Company notified Frazier that he would be laid off on March 31, 1958. Operations Manager R. W. Munger advised Frazier on the layoff date that the Company had a job for Frazier in the bargaining unit but that he was not transferring him there because of Respondent's aforestated objections. Frazier thereupon took up the matter with Donovan Randall, the Union's business representative.[4] Frazier told Randall that he had applied for, but had not received, a withdrawal card in 1946 or 1947, and Randall said he would investigate the matter. Randall testified that he had found, upon investigation, that Frazier did not have such card.

The withdrawal card requirement in the contract as a condition to continuing seniority is illegal for the reasons

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[4] Randall is business representative of District 111, which embraces Respondent Union as one of its constituent locals. One of Randall's duties is to service Respondent's contracts.

stated above. Thus, its application to Frazier at Respondent's behest is also unlawful. In addition to the already stated grounds of illegality, there is also the fact in Frazier's case that the withdrawal card requirement was not even part of the then operative contract when Frazier transferred out of the unit in January 1947. This retroactive application of union-security requirements as a condition of employment is still another reason to support the General Counsel's complaint respecting Frazier.[5] I find, accordingly, that Respondent has caused the Company in performance of said contract to discriminate against Frazier in violation of Section 8 (b) (1) (A) and (2) of the Act.[6]

IV. The effect of the unfair labor practices upon commerce

The conduct of Respondent set forth in Section III, above, occurring in connection with the operations of the Company described in Section II, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist

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[5] Cf. *Murphy's Motor Freight, Inc.*, 113 NLRB 524, enfd. 231 F. 2d 654 (C.A. 3); *Montgomery Ward & Co., Inc.*, 121 NLRB No. 188; *New Jersey Bell Telephone Co.*, 106 NLRB 1322, enfd. 215 F. 2d 835 (C.A. 2); *The Public Utility Construction and Gas Appliance Workers of the State of New Jersey, Local 274, Plumbers etc.*, 120 NLRB No. 57.

[6] Although Frazier's name has not appeared on any posted seniority list at least since January 1947, and he has not protested such omission, the record establishes a plant practice under the contracts of not posting the seniority standings of employees who had transferred from the unit to a salaried position such as Frazier occupied during this entire period. Any waiver argument which might otherwise be made in this connection is therefore unavailable here.

therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Company no longer operates its Mt. Vernon plant, as indicated above. I shall therefore not recommend any reinstatement as to Frazier, but shall recommend that Respondent make Frazier whole for any loss of pay Frazier may have suffered from March 31, 1958, until such time on or before July 31, 1958 (when the Company closed down operations), when Frazier would have been terminated absent Respondent's unlawful conduct. The amount of back pay, if any, shall be determined in accordance with *F. W. Woolworth Company,* 90 NLRB 289.

Upon the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Company is engaged in commerce within the meaning of Section 2 (6) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Local 1417, International Association of Machinists, AFL-CIO, Respondent herein, its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect too provisions of any agreement with The Electric Auto-

Lite Company, or any other employer within the meaning of the Act, which unlawfully discriminate in regard to acquiring, retaining, or restoring of seniority rights of employees of said Company or of any other employer;

(b) Causing, or attempting to cause, the aforenamed Company to discriminate against employees in violation of Section 8 (a) (3) of the Act;

(c) In any like or related manner restraining or coercing employees of the aforenamed Company in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole Cecil Frazier for any loss of pay suffered by reason of Respondent's action in causing the Company to discriminate against him, in the manner set forth in the section, above, entitled "The remedy";

(b) Post in conspicuous places at its offices, including all places where notices to members are customarily posted, copies of the notice attached hereto as Appendix. Copies of said notice, to be furnished by the Regional Director for the Fourteenth Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(c) Notify the said Regional Director in writing, within twenty (20) days from receipt of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days of the date of receipt of this Intermediate Report and Recommended Order the Respondent notifies the said Regional Director, in writing, that it will comply with the above recommendations, the National Labor Relations Board issue an order requiring it to take such action.

Dated at Washington, D. C., this 6th day of January 1959.

RALPH WINKLER
Ralph Winkler
Trial Examiner

APPENDIX

NOTICE

TO ALL MEMBERS OF LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT restrain or coerce employees of The Electric Auto-Lite Company in the exercise of rights guaranteed by Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause The Electric Auto-Lite Company to discriminate against its employees in regard to seniority or otherwise in violation of Section 8 (a) (3) of the Act.

WE WILL make whole CECIL FRAZIER for any loss of earnings he may have suffered as a result of discrimination against him.

LOCAL 1417, INTERNATIONAL
ASSOCIATION OF MACHINISTS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Fourteenth Region

Case No. 14-CB-574

In the Matter of:

LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

and

CECIL FRAZIER, an Individual,

and

THE ELECTRIC AUTO-LITE COMPANY, MT. VERNON FOUNDRY DIVISION, Party to the Contract.

First Floor Room, Court House,
Mt. Vernon, Illinois,
Tuesday, October 14, 1958.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 a.m.

BEFORE:

RALPH WINKLER, Trial Examiner.

APPEARANCES:

ALVIN F. SLAIGHT, 1114 Market Street, St. Louis, Missouri, appearing as counsel for General Counsel.

DANIEL F. GRUENDER, 1114 Market Street, St. Louis, Missouri, appearing as counsel for General Counsel.

PLATO E. PAPPS, 1300 Connecticut Avenue, Washington, D. C., appearing on behalf of International Asso-
2 ciation of Machinists, respondent.

FRED CARSTENS, 3547 Olive Street, St. Louis, Missouri, appearing on behalf of Lodge 1417, IAM-AFL-CIO, respondent.

* * * * * * * * * *

10 **Donavan Randall**

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * * *

Q. What is your job or occupation, Mr. Randall? A. Business representative.

Q. For whom? A. District International Association.

Q. 1417 Local, is that a constituent of District
11 111? A. I am a Business Representative of District 111.

Q. In your capacity sir, you're a full time employee of District 111, are you not? A. I am.

Q. Part of your duties are service the contract between Local 1417 and the Electric Auto-Lite Company, Mt. Vernon Foundry Division? A. Correct.

Q. Does Local 1417, is that comprised of employees of the Electric Auto-Lite Company? A. Yes, it is.

Q. Now, during the period January 1948, up until the

present time, has there been in effect a contract between Local 1417 and the Electric Auto-Lite Company, Mt. Vernon Foundry Division?

* * * * * * * * * *

The Witness: Not until the present time.

Q. (By Mr. Slaight.) Up until September, is that right? A. Yes, I believe that is.

Q. There was a contract in effect during that time,
12 is that correct? A. Yes.

* * * * * * * * * *

(Thereupon the documents heretofore marked General Counsel's Exhibit No. 2. was received in evidence.)

* * * * * * * * * *

14 Q. (By Mr. Slaight.) Are you familiar with the structure of Local 1417, that is, who are the representatives at the Mt. Vernon Plant? A. You mean its local representatives?

Q. Yes. A. Yes.

Q. Now, how many representatives do you have at the plant, that is representatives of Local 1417, with the company? A. Three, I believe.

Q. And who are they? A. Roy Adams, Huim McQuire, the third one Ross Horton.

Q. Now, are these individuals of the shop committee? A. That is right.

Q. And who is—Mr. Adams is Chairman of the Shop Committee, is he not? A. I believe that is correct.

Q. They are the parties who handle the grievances that arise under the contract from day to day, administration of the contract? A. That is right.

Q. Directing your attention to on or about April 5, 1958, did you have a new conversation with Cecil Frazier
15 at that time? A. Approximately that time, I don't remember the date.

Q. Around the first of April was it not, sir? A. Possibly.

Q. Where did you meet Mr. Frazier? A. At the Central Trade and Labor Hall.

Q. Here in Mt. Vernon? A. Right.

Q. Who was with Mr. Frazier at the time? A. Robert Wagner.

Q. They were sitting in a car? A. I don't remember about that. I met them in the Labor Temple.

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What was the nature of the discussion you had with Mr. Frazier?

The Witness: The nature of the discussion was relative to reinstatement, I believe, in the local.

16 Q. (By Mr. Slaight.) Relative to reinstatement in his job, was it not, at the Mt. Vernon Foundry Division? A. I believe that was discussed.

Q. That is right. And do you recall anything else that was said? A. Some discussion as to whether he had applied for a withdrawal card. I remember asking him if he had ever filled out an application for a withdrawal card.

Q. And he said he had? A. Had not filled out an application for withdrawal card.

Q. Oh, filled out an application for withdrawal card. He said he applied for a withdrawal card, didn't he? A. He asked or talked to someone about a withdrawal card, he wasn't sure to who he talked to.

Q. And Mr. Wagner spoke up during the conversation, didn't he? A. Yes.

Q. And he said that he had also applied for a withdrawal card back in 1946? A. Not applied, but asked to talk to someone relative to a withdrawal card.

Q. He hasn't been issued any withdrawal card in any event? A. They both stated they had never filled out an application for withdrawal.

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17 Q. (By Mr. Slaight.) Mr. Frazier told you he had applied for a withdrawal card or asked for a withdrawal card? A. He talked to someone in regard to that.

Q. Mr. Wagner, who was with Mr. Frazier, said he had also applied for a withdrawal card or asked for a withdrawal card? A. Right.

Q. And they told you this was back in 1946, when they had applied for them? A. I don't believe either one was sure as to when it did take place, approximately '46.

Q. Approximately that time, yes. Now you told—

18 did you give them a definite answer as to their status in the union was or anything like that at this time? A. That they were delinquent themselves.

Q. I see, you told them that they were? A. Yes.

Q. Now, under the contract between Local 1417 and the Electric Auto-Lite Employees, who are transferred out of the bargaining unit, that it out of the union represented by the Local 1417, they can retain accumulated seniority under certain conditions, can they not sir? A. I believe by reading the contract that is correct.

Q. Well, you service the contract didn't you and your familiar with it? A. Yes.

Q. Now, one of those conditions is that the person who is transferred obtain a withdrawal card isn't that correct? A. That is right.

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20 Mr. Papps: I'd like to stipulate with counsel, that the company closed the plant, permanently closed the plant about September 1, 1958.

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Mr. Slaight: I will stipulate this plant was closed on July 31, 1958.

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23 Cross-Examination

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24 Q. Do you recall when Mr. Frazier first became a member of the union? A. Not specifically, when he became a member, no.

Q. Can I refresh your recollection, would it have been April 1946? A. Approximately, yes, that would be about correct.

Q. Do you recall, he was dropped as a member in July of 1947? A. That would be approximately right, yes.

25 Q. Does that refresh your recollection? A. Yes. Due to the fact he was a member for something like a year, and that if I remember correctly, his last dues were paid in March of 1947.

Q. Is it correct to say, under the constitution, if you remember, delinquent for 90 days, he would be dropped at the end of a 90 day period? A. That is correct.

Q. With regard to General Counsel's Exhibit 2, which is the contract. Is that the contract that was in effect back in 1946 or '47? A. No, it isn't the same contract, it's a modified contract shall we say.

Q. I see, when was the first contract that the local 1417, had with the company? A. I believe it was in '46.

Q. Do you recall the date in 1946? A. No, I wouldn't.

Q. I suppose we can get that later. Now, do you recall in 1946, whether all employees were members of the union, all employees in the bargaining unit, were members of the union? A. Yes.

Q. And has that been true through the years, that all employees that have been in the bargaining unit, have

26 been members of the union? A. That's right.

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Q. (By Mr. Papps.) This party that Mr. Frazier talked to about a withdrawal card, did he name him? A. No, he didn't seem to be sure who he had talked to.

Q. Do you know whether he spoke to an officer of the union? A. I didn't ask him who he had talked to, and he seemed to be of the opinion it was someone down in the shop, possibly a committeeman.

Q. You were president of the local during the period he transferred out of the bargaining unit. As I recall, did he speak to you about a withdrawal card? A. Not at the time, no, sir.

Q. If he had, would it be considered by you? A. Certainly would have.

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27 (The document heretofore marked General Counsel's Exhibit No. 3 was received in evidence.)

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(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.

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(The document heretofore marked General Counsel's Exhibit No. 4 was received in evidence.)

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29 **Cecil Frazier**

A witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

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30 Q. Mr. Frazier, will you state whether or not you were ever employed by the Electric Auto-Lite Company, Mt. Vernon Foundry Division? A. Yes, I was.

Q. What date were you employed by that company? A. I was employed in January 1946.

Q. And how long did you work for the company? A. I worked for them to March 1958.

Q. Now, directing your attention to 1946, what were you employed as, in what job classification or capacity were you employed? A. I was employed as a machinist.

Q. And were you represented by any labor organization at that time? A. When I was employed, we was in the Molders Union.

Q. There after, were you represented by any other labor union? A. Yes, we was in Machinists Local 1417, in March of '46.

Q. And during this period, were you represented by Machinists Union, were you a member of any labor organization? A. No, other than 1417.

Q. That is what I mean, were you a member of any
31 labor union? A. Member of 1417 local.

Q. Now were you ever transferred to any other work other than the machinist work. A. Yes, I was.

Q. When was that, sir? A. That was in the last of '46 or first of '47.

Q. What were you transferred to, what job? A. Time checking over the machinist.

Q. Now, is that time checker, is that like a timekeeper? A. Yes, it is.

Q. And were you represented by any other labor organization? A. Other than the machinists?

Q. Were you represented by any labor union when you were time checker? A. I was when I went to the salary group.

Q. Let me see, if you transferred to the time checker job, that was a salary payroll, right? A. Not at first, it was hourly based.

Q. Later it became a salary job? A. Yes.

Q. When did it become a salary job? A. Latter part of '46 or first of '47.

Q. First of '46?

Trial Examiner: When were you transferred to this work?

The Witness: November 6.

32 Q. (By Mr. Slaight.) When the job became salaried, then you were represented by no labor organization, is that correct? A. That's right.

Q. Now, will you just briefly tell us what your duties were as timekeeper, sir?

Trial Examiner: It is important, I take it, the article 5 of the contract in question. He is using the term timekeeper and I presume the parties will stipulate timekeepers are not within the bargaining unit.

Mr. Slaight: It further notes supervisors.

Mr. Papps: I will stipulate this is not in the bargaining unit.

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Trial Examiner: Let me ask you this sir. You were time keeper or time checker, how long were you in that job?

The Witness: I was in that job until 1958.

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33 Q. (By Mr. Slaight.) Now, at the time you were transferred from your job in the Machinists Unit to the salary payroll, did you have any—did you attempt to obtain a withdrawal card? A. Yes, I did.

Q. And from whom? A. From two different parties.

Q. Who were they? A. One, the financial secretary.

Q. And who was he? A. I think his name was Heins, I am not positive of that.

34 Q. And what did you say to him, or what did he say to you? A. I told him I was on salary, and I wanted a withdrawal card.

Q. What did he say? A. He told me about getting me one.

Q. You say there was some other person there, was there anyone else? A. Yes.

Q. Who was that? A. I later contacted—

Q. (Interrupting.) Who was he? A. Carl Wimberley, Tood Badget and Robert Wagner and Cecil Frazier, which is myself.

Q. Now, who is Mr. Wimberley?

Trial Examiner: (Interrupting.) Now, were you a member of the union in 1946?

The Witness: Yes, I was until 1947.

Q. (By Mr. Slaight.) Who was Mr. Wimberley? A. He was, I believe, chairman of the committee.

Q. Of Local 1417? A. Yes.

Q. Do you recall where you had this conversation with Mr. Wimberley? A. Yes, in the Machine Shop.

Q. Will you tell us what was said at this conversation?
A. With respect to obtaining a withdrawal card?
35 Q. Yes. A. I asked him to check and see why we
couldn't receive a withdrawal card.

Q. What did he say? A. He told us they didn't issue withdrawal cards.

Q. Did he say anything else? A. Yes, he told us we had not seniority rights whatsoever, we would have to be reinstated.

Q. Now, you testified earlier, that you were laid off in March of 1958. When did you first learn of the fact that you would be laid off? A. Well, when I first learned of the fact my job was going to be abolished was in February.

Q. That was February of 1958? A. '58.

Q. Yes. And how did you learn of this, sir? A. The supervisor called me in and told me the job was going to be abolished.

Q. I see. There after did you have any conversation with the union representative? A. Yes, I did.

Q. Who was that? A. Roy Adams.

Q. Where did you have this conversation? A. In the tool room, where my desk was at.

Q. And was there anyone else present? A.
36 No, there wasn't.

Q. About when did you have this conversation? A. A few days after I heard my job was going to be abolished.

Q. That was in February, you say? A. Yes, it was.

Q. Now, will you tell us what Mr. Adams said to you, and what you said to him, if anything? A. He told me I couldn't go back in the bargaining unit, I didn't have no withdrawal card.

Q. Did he say anything else? A. I have asked for one, why didn't I get one, it wasn't my fault.

Q. Did he say anything about a conversation with Mr. Bennett? A. He said Mr. Bennett had informed him they were going to abolish my job.

Q. Anything elese? A. And he told him also, that I couldn't go back in the bargaining unit.

Trial Examiner: He told him, who is he?

The Witness: Mr. Bennett. Roy Adams told Mr. Bennett.

Trial Examiner: He told you—

The Witness: (Interrupting.) He told me I couldn't go back in the bargaining unit.

Q. (By Mr. Slaight.) I understand that Mr. Adams told you that he told Mr. Bennett that you could not go
37 back in the bargaining unit, because you had not obtained a withdrawal card? A. That's right.

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Trial Examiner: (Interrupting.) Anything that Adams and Bennett said are stricken, as far as this witness has testified.

Mr. Slaight: This witness is testifying to what Roy Adams, chairman of the shop committee told him.

Trial Examiner: I will take something that was told to him, and accept the testimony to the extent that it's something Adams told the witness as having told Bennett. I am not taking as proof of the fact that Adams did in fact, say it and describe to Bennett.

Who was Mr. Bennett?

The Witness: I can't tell you what his office was.

Trial Examiner: Is he your boss?

The Witness: No, he handles shop grievances for the company.

Trial Examiner: You don't know what position he had?

The Witness: No, I don't.

Q. (By Mr. Slaight.) When were you actually
38 laid off, again, sir? A. March the 31st.

Q. 1958? A. '58.

Q. Now, at the time of your lay off, did you have any conversation with any company representative, about that? A. Yes, I did.

Q. Who did you talk to? A. Mr. Bob Munger.

Q. Who is he? A. He is the plant manager.

Q. When did you talk to him sir? A. March the 31st.

Q. And what did you discuss at this time? A. I asked him if my job was available in machinists, as far as the company was concerned.

Q. What did he say? A. He told me it was.

Q. What else was said? A. He told me he had been informed by the union I didn't have a withdrawal card. I told him to take that up with the union.

Trial Examiner: You spoke to plant manager Munger, is that correct? You asked him whether or not your job was available as far as the company was concerned?

The Witness: Yes.

Trial Examiner: Now, was there a job available
39 in the machine shop, at that time, do you know? Were you speaking about eligibility?

The Witness: Yes.

Q. (By Mr. Slaight.) Now, you said you took it up with the union, did you? A. Yes, I did.

Q. Who did you talk to? A. I talked to Don Randall.

Q. Where did you talk to Mr. Randall? A. The lodge, in the front of the lodge, out here on Main Street.

Q. Who else was present? A. Bob Wagner.

Q. When did you have this conversation with Mr. Randall? A. Saturday, this first of April. First Saturday in April.

Q. First Saturday in April? A. Yes.

Q. Now, will you tell us what was said at that time? A. I told him the company was willing for me to go back to work. I wanted to know what the union was going to do about it.

Trial Examiner: Did you tell you were eligible or willing as far as your seniority was concerned at that time.

The Witness: He asked me why I didn't obtain a withdrawal card. I told him I asked for one that as far as I knew I could do it, and Mr. Wagner spoke up and said there is three of us asked for one and never re-
40 ceived them.

Q. (By Mr. Slaight.) Anything else said? A. He told me he would investigate it and get in contact with me the following week, which he never did.

Q. Did you ever attempt to contact Mr. Randall again? A. Yes, I did.

Q. How many different occasions? A. Four different occasions.

Q. Did you actually talk to him? A. No, I did not.

Q. Who did you see or talk to? A. His wife three times, and his son once.

Q. What did you do, phone them? A. Phoned them.

Q. What did you generally tell him, at that time? A. I told who I talked to and asked Randall to call me.

Q. Did he ever? A. He never called me.

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Cross-Examination

Q. (By Mr. Papps.) When did you last pay dues in the union, Mr. Frazier? A. In 1947, I believe, in March.

Q. And at that time you weren't in the bargaining
41 unit, is that correct? A. That's right.

Q. You maintained your membership despite the fact, you weren't in the bargaining unit, is that correct? A. That is correct.

Q. When you first joined the union in 1946, do you recall the date? A. It was March, I can't recall the exact date.

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Q. * * * Now, so that I get this straight, in 1946 you were first employed by the company, is that correct? A. That's right.

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43 Q. I see, then you transferred out in 1946, and went as a checker, is that correct? A. That's right.

Q. At that time you were no longer covered by the bargaining unit, would that be correct? A. I was covered by until I dropped out, as long as I paid my dues I was covered, I had to be.

Q. Do you recall whether or not you were in the bargaining unit when you transferred out? A. How is that?

Q. When you transferred from a machinists to a
44 time checker, are you now saying you were covered by the contract? A. Covered by the contract, no, sir, they asked me to get a withdrawal card.

Q. You were not covered by the bargaining unit when you transferred out of the unit, is that correct? A. That's right.

Q. All right. Now then you said you went on a salaried payroll the latter part of the year, am I correct in that? Then you went and tried to get a withdrawal card the latter part of the year? A. Yes, sir.

Q. About when do you remember? A. I don't know exactly, either last of '46 or first of '47.

Q. That you applied for a withdrawal card? A. Yes.

Q. And you weren't able to get one at that time? A. No.

Q. You indicated you talked to the financial secretary Heins, is that correct? A. I think it was his name, I am not positive.

Q. That was in 1946 and early '47? A. Yes.

Q. And what did you say to your knowledge? A. I told him I was out of the bargaining unit and I wished a withdrawal card.

45 Q. And did you ask him for a application card? A. No, sir. I didn't know nothing about a application card, he said nothing about one.

Q. What did he say to you? A. He told me he would see about getting me a withdrawal card.

Q. And you didn't do anything more about it? A. Only asked the chairman of the committee.

Q. When was that? A. That was the first part of '47.

Q. This was after the talk with Heins? A. After I talked to him.

Q. Who was the chairman of the bargaining unit? A. I think Carl Wimberly, I am not positive that is the man we talked to.

Q. All this time you were applying for a withdrawal card, you had somebody with you, is that right? A. I had no one with me when I went to Heins.

Q. You went to Heins alone, and after that, who was with you when you talked to Wimberly? A. Robert Wagner and Todd Baget.

Q. They were both with you? A. Yes.

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46 Q. What did Wimberly tell you, do you remember?

A. As far as I remember, he told us they wasn't issuing withdrawal cards and we wouldn't be able to get one. But he told us we would have continued seniority rights, so whenever we could be reinstated.

Q. You would reinstate, when? A. Where we had to go back to the bargaining unit, we could.

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47 Q. (By Mr. Papps;) When you talked to Randall, did you ask for a reinstatement card or application? A. No, I did not.

Q. You checked with him to see if you could be reinstated, is that right. A. I checked to the contract in '46.

Q. You didn't ask for an application for reinstatement? A. This is the first I knew of an application.

Q. I see. Now, I want to get this perfectly clear. You spoke to Randall about reinstating in the union, is the [that] correct? And you asked about reinstating or precisely what did you say to him when you first met him? A. I don't know the exact words, that's out of the question.

Q. As best as you can remember? A. I told him I had applied and he asked whether or not I applied in writing.

Q. That was? A. Not in writing.

Q. I see. A. I was laid off according to the
47 seniority standing with the contract, I should be back to work.

Q. But you never applied for a card from him? A. No, sir. I did not apply.

Q. And would that—did you apply for a job with Randall? A. I told Randall the company was willing for me to go back to work. The committee said I couldn't go back to work.

Q. Did Randall say you couldn't go back to work? A. He didn't tell whether I could or couldn't.

Q. He was just checking on reinstatement? A. Yes, sir.

Q. Is that correct, all he was doing is that checking Randall was checking on your reinstatement, is that correct or isn't it.

Mr. Slaight: How would the witness no [know] what Randall was doing?

The Witness: I do not know what Randall was doing.

Q. (By Mr. Papps:) That is all you were asking him to do is to check on your reinstatement? A. Whether I could go back in the union or not.

Q. That is all you asked him isn't it? A. Yes.

Q. As far as I can tell, you didn't work as a machinists [sic] for 11 or 12 years, is that right? A. Yes, sir.

Q. Did you work as a machinists right before that?

48 A. I did not.

Q. When you were laid off, did you go to the the company and apply for a job? A. Yes, I did.

Q. Did you fill out an application form? A. No.

Q. What did you say to the company? A. I asked Mr. Munger if I could go back to the machinists, as far as the company is concerned, he said I could.

Q. That is all you asked him? A. Yes, sir.

Q. He said you could? A. That's right.

Q. Did he tell you when you could? A. He did not, he would inform me. The union told him I didn't have no withdrawal card.

Q. When you were laid off, were you given notice of lay off sometime in March? A. How was that?

Q. When were you laid off? A. Officially, the 31st day of March.

Q. And when did you first go to Munger and try to find

out about getting your job as a machinists? A. The 31st day of March, I got my last check.

Q. You went to Munger at that time? A. Yes, I

49 did.

Q. Did you go to him after that at all? A. No, sir.

Q. You never went to Munger again for a job? A. No, sir. I did not.

Q. Did Munger ever call you about a job? A. No, he did not.

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50 Q. When did you get your notice of lay off? A. I got my notice of lay off in the second week in March.

Q. You were told you were going to be laid off the second week in March? A. Somewheres there abouts, that's not exactly.

Q. You didn't do anything about it for two weeks after that? A. I wasn't officially laid off until the 31st day of March.

Q. You didn't try to chek on senority during that period? A. I did not try to check with Randall, no.

Q. You worked in the shop at that time, as time keeper? A. That's right.

Q. And what were your duties, did you revolve through the plant as timekeeper? A. I did not, no.

Q. What did you do? A. I took care of the tool room and time for the machinists.

Q. While working as a timekeeper. A. Yes, sir.

Q. Did you have two jobs during that period? A. A small tool room, maintainance of a small tool room.

Q. Yes. Were you like a stock clerk there? A. No. Just issued out tools.

51 Q. Did you keep track of the tools? A. Yes.

Q. This is all during the 10 year period? A. That's right.

Q. That's where the machinists came and checked into you? A. That is correct.

Q. They punch a time clock there? A. That's right.

Q. You kept track of the time clock? A. That's right.

Q. Was there a bulletin board in there? A. Yes, there was.

Q. Was there a senority list posted? A. Yes, there was.

Q. Was your name on the senority list? A. It was not on it, that one. On the '46 and '47.

Q. Your sure of that? A. Yes, I am.

Q. Your name was on the senority list in 1946 and 1947. A. Yes, sir.

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Q. Did you come off at a later date? A. Yes, sir.

52 Q. What did you do about it? A. Nothing.

Q. You didn't stop to inquire about your name being off the senority list in 1946?

Trial Examiner: That was when?

The Witness: Last part of '46 and first of '47.

Q. (By Mr. Papps.) You never checked on why your name went off the senority list? A. No, I didn't.

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53 Q. (By Mr. Papps.) Let's take back in March of 1958, Mr. Frazier, when you were notified you were being laid off, did you then check the senority list to see whether your name was on it? A. My name was not on the senority list.

Q. You never in '58, complained about the fact your name was not on the senority list, is that correct? A. No.

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Trial Examiner: I take it, all the years since '46, at least you knew the senority list was posted. Was it posted monthly?

The Witness: No. I don't remember just how it was posted, once a year maybe, once a year.

Trial Examiner: And you were familiar with the fact it was posted when it was ever posted, you were familiar with the fact, weren't you?

54 The Witness: Yes.

Trial Examiner: All all the time you were aware your name was not on the senority list?

The Witness: That's right.

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58 Trial Examiner: Did there ever come a time with Mr. Munger, when you asked him for a job?

59 The Witness: Yes, I did.

Trial Examiner: When did you ask for a job?

The Witness: March the 31st.

Trial Examiner: And what did he say to you?

The Witness: I made the statement here and I'll make it again. I asked if my job was available out at the foundry as a machinists and he said as far as the company is concerned, he told me it was.

Trial Examiner: You mean at that time the company was in the process of disolving?

The Witness: Not that I knew of.

Trial Examiner: Not that you knew of. You asked for a job, and he said he had a job for you?

The Witness: My job was available.

Trial Examiner: If your job was available as far as the company was concerned?

The Witness: He told me it was.

Trial Examiner: And did you take it to mean there was a job available for you at that time?

The Witness: I did according to the standing senority, when I went on salary.

Trial Examiner: I don't understand.

The Witness: They had a contract covering the men in the bargaining unit, when they went on salary, that is my understanding.

60 Trial Examiner: Was there a job available?

The Witness: According to senority there would have.

Trial Examiner: You would have been entitled to bump somebody else, is that what your saying?

The Witness: That's right.

Trial Examiner: Randall said as far as the company was concerned there was a job for you, I mean Munger?

The Witness: Munger said that.

Trial Examiner: What did Randall—you spoke to Randall sometime after that and Randall—

The Witness: (Interrupting.) I told him, the company told me a job was available down there, but the union committee told me I couldn't go back to work because I didn't have no withdrawal card.

Trial Examiner: You didn't go back to Munger?

The Witness: No, I did not, I didn't see the necessity.

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61 Q. (By Mr. Papps.) When you talked to Munger, did you ask him if there was a job available, and he said "so far as he is concerned", is that right?

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A. That's right.

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62 Q. And you didn't ask him for a job outright, did you? A. No, because he knew what my senority was, when I took the salary job.

Q. Oh he did, your name wasn't on the senority list was it? A. It was when I took the salary job.

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Q. (By Mr. Papps.) But you didn't, so I can get your position perfectly clear, you didn't determine it necessary to ask him outright for employment when you were laid off, is that right? A. No, not necessarily come right out and say, here give me a job.

Q. You didn't come right out and ask for one? A. No.

Q. Did you ask him for a transfer back in the bargaining unit? A. No, I didn't.

Q. Is there work available for you back in the bargaining unit, do you know that? A. There would have been.

Q. Did you know whether or not there would, or
63 did you know there was? A. According to my
senority when I left there, yes.

Q. You keep talking about senority, that isn't the question. I asked if you know whether or not there was a job available for you when you were laid off in March 31, 1958? A. I don't know.

Q. You didn't know? A. No.

Q. You didn't ask for a job, is that correct? A. I just asked if any job was available as a machinists.

Q. You didn't ask for a transfer back? A. I did not.

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Redirect Examination

Q. (By Mr. Slaight.) Mr. Frazier, you testified about this conversation you had with Mr. Roy Adams, the chairman of the union committee, and you testified before you had this conversation, you talked to Mr. Crow? A. Yes, sir.

Q. Who is Mr. Crow? A. He was my supervisor.

Q. He was your supervisor. You had that some-
64 time in February, is that right? A. That's right.

Q. Now, after Mr. Adams talked to you and told you, that you could not go back to the bargaining unit—A. (Interrupting.) That's right.

Q. Because you had not obtained a withdrawal card. Did you there after discuss the matter with Mr. Crow? A. Yes, I did.

Q. When was that? A. A few days afterwards.

Q. A few days after, you talked to Mr. Adams? A. Yes.

Q. What did you say at that time? A. He told me the company was trying to make another job available for me.

Q. Did you discuss with him about your conversation with Mr. Adams? A. I just told him what Roy had told me.

Q. What was that? A. That he told me I couldn't go back in the bargaining unit, because I didn't have a withdrawal card.

Q. What did Mr. Crow say to you? A. He said he was informed of that.

Q. There after he said that your job was being abolished and they would try and make a place for you some place else? A. Yes.

65 Q. Was this timekeepers job abolished? A. Yes, it was.

Q. When was it abolished? A. Sometime in February, along in the second week in February.

Q. Then you went to work as a timekeeper at a different unit? A. Different unit.

Q. Was that the same work you had been doing before? A. Same work.

Q. Then you were laid off on March 31? A. Yes, sir.

Q. Finally and completely? A. Yes, sir.

* * * * * * * * * *

67 Recross-Examination

Q. (By Mr. Papps.) Mr. Frazier, you said Mr. Crow told you he was going to try to find another job for you? A. Yes.

Q. When did he tell you this? A. That was in February.

68 Q. Well then, so I can get Mr. Crow correct, who is he again? A. He was my supervisor.

Q. He was the man who had the right to hire or fire you? A. As far as I know.

Q. He was the man you went to talk to when you were told you were laid off? A. He was the man that called me into the office and told me so.

Q. When did he call you? A. The first or second week in February.

Q. He told you that you were going to be laid off? A. He told me the job was going to be abolished, the machinists timekeeper.

Q. Was your job abolished? A. That's right.

Q. When was that to be abolished? A. First or second week in February, I don't recall the dates.

Q. So actually, you then went to work as a timekeeper from that job to another timekeepers job. A. That's right.

Q. Were you timekeeper in other jobs, employed in the machinists or another shop? A. Another department.

Q. What department was that? A. Just on one of the units, that is all I can tell you.

69 Q. Covered by the Molders Unit, wouldn't it? A. No, they was—yes.

Q. Who were the employees you were timekeeping, don't you know? A. I was taking time for the molders, yes, I was working for the company.

Q. This was a entirely different job than the one you got when you were laid off, is that right? A. That's right.

Q. And in February, did you go and try to get your machinists classification back from the union, when you were told you were being laid off? A. I went to Randall.

Q. He didn't call you in until April? A. I didn't go to them, the man came to me.

Q. You didn't exercise any seniority rights in February, when you were laid off that job? A. Not when the man told me I could go back.

Q. Then you went out and got another job? A. No. I transferred to another timekeepers job.

Q. Did you ask them to. A. No, I did not.

Q. Who was Roy Adams again? A. Chairman of the Committee, Machinists Union.

70 Q. What do you mean committee? A. Handles the grievances for the men.

* * * * * * * * * *

72 **Wayne Bennett**

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * * *

73 Q. (By Mr. Slaight.) What is your occupation or position with the company? A. I am assistant to the operations manager, Mr. Munger, in charge of the plant.

Q. You were in charge of the plant then and Mr. Munger was— A. Operations manager, in charge of all the foundries.

Q. I see. As part of your duties, did you handle grievances with the union? A. Yes, sir.

Q. You represented the company? A. Yes, sir.

Q. Directing your attention to 1958, did it come a time when it became necessary to lay Mr. Frazier off and abolish his job? A. Yes, sir.

Q. When was that, do you recall sir? A. It was right after the first of the year, the latter part of January, first part of February. To be exact I couldn't state.

Q. I see. What did you do when you learned of the fact he would be laid off? A. Production requirements necessitated reducing our manpower. We had several salaried employees that had previously been in the molders union. I went around to the corresponding representative of the molders and contacted them, telling them that the following week that these men, who have been serving as salaried employees were being laid off and transferred back to the bargaining unit, no problem there. I went down to the Maintenance Union to the representative, president actually, Mr. Roy Adams, and informed him the same way, the only ex-maintenance man was Cecil. I told him the same thing I told the Molders. He told me Cecil could not come back to the bargaining unit because he had not taken an withdrawal slip, at the time, he was not a member in good standing.

74

Q. He couldn't go back in the Maintenance Unit? A. That's right.

Q. And the man was Chairman of the Committee for Local 1417? A. That's right.

Q. You told him you were going to transfer Mr. Frazier back into the Maintenance Unit, is that correct? A. That is correct.

Q. He told you, you couldn't do that? A. That is correct.

Q. What did you do there after? A. I went back into

the office and informed Mr. Munger as to what he had told me. In that changing around there was another foreman being cut back to the checker, and he made
75 it known a short while later, he didn't want to go back as a checker, he would go back to the bargaining unit, so that left another opening as far as salaried employees were concerned. Then Cecil Frazier was placed on that job, that this foreman would have been on, until about March. Then it necessitated cutting forces even more and it was at that time when Cecil was laid off.

* * * * * * * * * *

How were you going to get Mr. Frazier back in, did the unit have a job for him?

The Witness: Transfer him.

Trial Examiner: Would you have to fire somebody?

The Witness: It involved laying off a younger maintenance man.

Trial Examiner: Would you have done that under the contract?

The Witness: Oh, yes.

Trial Examiner: Could you tell me under what
76 provision of the contract would you have done that, I show you General Counsel's 2?

The Witness: Of course, at the time, I had no way of knowing what Cecil's status was or whether he has got a withdrawal card or not. That is no concern of the company. That is what Roy Adams told me, he does not have one and is not a member in good standing.

Trial Examiner: I am asking you—you say to put Cecil back to work in the maintenance unit, you would have to fire someone else?

The Witness: Yes.

* * * * * * * * * *

77 Trial Examiner: The reason why I'm asking, this contract talked in terms of general layoff. I wonder since it talked in terms of—what happens when this general lay off the effect the contract says, article 5

section 2(a), the youngest man will be laid off first, now, what happens when it is not a general layoff, just a individual layoff, do you have a different policy in the contract or is the contract silent on that point. We have to interpret the contract. Now, coming back again to the original question under sub section 10(a) of article 5, what is it again, if were going to interpret the contract. Since you were representing the company, administering the company what does it mean to accumulate his departmental seniority but not job seniority?

The Witness: They have a maintenance sheet
79 showing the time they have been in from the maintenance department, they can bid on jobs within the maintenance department. For example, we had a maintenance man work in the cleaning room, which is another department, he carried seniority in that department. We had men biding for repairing and maintaining motors, that was his specific duty as a job, then have the seniority of a job, they would still have maintenance department seniority.

Trial Examiner: Well, let's say Frazier had had a withdrawal card, he would under this contract, you say, he would maintain accumulative departmental seniority, is that right?

The Witness: That's right.

Trial Examiner: Which meant a maintenance man an machinists rites—say a general maintenance man?

The Witness: That's right.

Trial Examiner: What about if Frazier had no job seniority, what would the effect of the contract be?

The Witness: Had he bid on the job he would have been repairing motors before he left the bargaining unit in '46. Then if he had been able to go back to the bargaining unit in '58, he could not have gone back to the specific job, of course and he would then go back to the maintenance department as a general maintenance man.

Trial Examiner: I see. Departmental seniority is generally not in any specific job.

80 The Witness: That's right.

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Q. (By Mr. Slaight.) So we would displace the youngest man in the maintenance department, right? A. Right.

Q. He would have held his job, is that correct?

Mr. Papps: I object to that.

A. Not the job, departmental seniority is what he would have had.

Q. (By Mr. Slaight.) At that time.

Trial Examiner: Did he have more accumulated departmental seniority over the years than any individual in the maintenance department?

The Witness: Possibly, not all of them, he was second or third.

Trial Examiner: Would he have more seniority than anybody not laid off at that time?

The Witness: Yes, sir.

Trial Examiner: There were various people kept in terms of seniority?

The Witness: Yes, sir.

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82 Cross-Examination

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89 Trial Examiner: Let the record show the parties are stipulating that Respondent's 2, for identification, being the companies, being a seniority list, identified by the witness and parties, are stipulating this is a seniority list that was posted by the company on or about January of 1947.

Mr. Slaight: In or after '47.

Trial Examiner: January or February of '47.

Mr. Slaight: Yes, that is right.

Mr. Papps: So stipulated.

Trial Examiner: Respondent's 2, received.

90 (The document heretofore marked Respondent's Exhibit No. 2 for identification was received in evidence.)

Trial Examiner: Mr. Witness, this is Respondent's 3, for identification. I presume you will testify that it purports to be a company seniority list for the date of February 18, '48?

The Witness: That's right, it was posted on that date in the maintenance department.

Trial Examiner: Are the parties stipulating that it is what it purports to be?

Mr. Slaight: I will so stipulate and it can be received into evidence, but I wonder what the purpose of it all is.

Mr. Papps: I offer that in evidence.

Trial Examiner: Respondent's 3, is received.

(The document heretofore marked Respondent's Exhibit 3 for identification was received in evidence.)

* * * * * * * * * *

Q. (By Mr. Papps.) You indicated that you had spoken to Adams, Mr. Bennett, about taking Frazier back into the bargaining unit, is that correct? A. Yes, sir.

Q. When did you speak to him about that?

91 A. Well, of course, prior to his being transferred out of the department, exactly I couldn't tell you, just the latter part of January or first part of February.

Q. And you said that Adams had told you that he had no seniority, is that correct? A. He did not have a withdrawal card, he was not a member in good standing as a result of not having a withdrawal card, could not accept him back into the bargaining unit.

Q. Did you understand he had no seniority or was it he had no withdrawal card? A. He had no withdrawal card.

Q. Did Adams indicate why he would not take him back into the bargaining unit? A. He was not a member in good standing.

Q. Was seniority discussed at all?

Trial Examiner: If you don't recall, just say you don't.

The Witness: Specifically, I can't recall, no.

Q. (By Mr. Papps.) Well, did you make any effort to transfer Frazier back into the bargaining unit, after you spoke with Adams? A. No, sir.

Q. Did Adams threaten to strike or take any action? A. He said the men would not work with him. His main reason was it was necessitate laying off a man who has been paying dues for the past 10 or 12 years. This
92 man would be out of a job. Cecil would come back in and take this man's job, he hasn't been paying dues for the past 10 or 12 years. That wouldn't go over very well with the men, especially the ones that were laid off.

* * * * * * * * * *

92 Q. You with the company, your charged with the responsibility of signing personnel, isn't that right? A. Yes, sir.

Q. Don't you have a Management Prerogative Clause in that agreement, about the layoffs and transfer of personnel. Look at General Counsel's Exhibit 2, if you have that there. Can you tell, if you know where that Management Prerogative Clause is? A. Normal procedure is just what I have done, informing this man we can no longer carry him on a salary basis, as it is necessary to cut the calary employees. Assuming he still had senority in the bargaining unit, I had no way of knowing he had no withdrawal card. I informed him and he transferred back in the bargaining unit effective several weeks from that date, it would be effective.

Q. The fact that he did not have a withdrawal card, led you to the conclusion he had no senority? A. I was told point blank, he was not a member in good standing. He could not be excepted into the union because he didn't have a withdrawal card.

Q. Didn't the senority bother you at all, your plant senority? A. Sure.

93 Q. Didn't you make an effort to put him back in the bargaining unit. A. If your asking me, I told you previously, if I put him back into the bargain unit after they informed me they wouldn't work with him, as not a member of good standing, I did not do that no. The contract I believe, stipulates he must be a member in good-standing.

Q. Let me get this straight. You knew from your plant records that Frazier had senority in your plant? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And yet, you didn't try to place him in a job when you laid him off, is that right? In another job as checker, am I correct? A. No, we tried to have him transferred back to the bargaining unit, where he came from.

Q. You didn't write him a letter and tell him he was transferred? A. No notice.

* * * * * * * * * *

96 Q. (By Mr. Papps.) When you hired knew employees, did you clear through the union before you hired them? A. There is a clause, after 30 days it is necessary they belong to the union. You hire them and right after 30 days they become members.

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99 Q. (By Mr. Papps) When did you first announce you were going to close the plant?

* * * * * * * * * *

The Witness: I believe the official announcement came out in May or June.

Trial Examiner: When did you know of it?

The Witness: I knew from discussions in the plant, it was not going to be left open, but as far as the Board of Directors decision, I did not know that until the official announcement.

100 Trial Examiner: I thought you told me, before they were—shortly before they were laying off people?

The Witness: Our production at that time was going down, we were operating with much less strength, we still we hoping the strength would pick up.

Trial Examiner: How many general maintenance men did you have in or about April of '58?

The Witness: I'd just have to guess, I'd say probably 8 or 9 somewhere along in there.

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104

R. W. Munger

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * * *

Q. Mr. Munger, what is your occupation or job? A. I am Operations Manager of the Electric Auto-Lite Foundry Division.

Q. Were you connected with the Mt. Vernon Foundry Division of Electric Auto-Lite? A. Yes, sir.

Q. And in what capasity were you in that plant? A. Before closing, I was Operations Manager.

105 Were you operations manager for approximately 8 months prior thereto? A. Approximately a year.

* * * * * * * * * *

Q. Was there a contract in effect between Local 1417 and the IAM of the Mt. Vernon Foundry, Electric Auto-Lite Company in 1946? A. There was a joint contract between the IAM and the Molders Union.

* * * * * * * * * *

Q. (By Mr. Slaight) Is this the contract in which you have just testified as being in effect between Local 1417 and the Mt Vernon Foundry Division? A. Yes, sir.

106 Q. And was that in effect at the time as that is stated therein? A. Right.

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(The document heretofore marked General Counsel's Exhibit 5 for identification was received in evidence.)

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107 Cross-Examination

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108 Trial Examiner: There is no question that Frazier transferred out of the bargaining unit in '46 or '47, as he has testified to that. Is that correct?

The Witness: That is right.

Q. (By Mr. Papps) Now, do you know on Septem-
109 ber 3, '46, if Frazier injured his foot? A. He did.

Q. He was laidoff for a short period of time, wasn't he. A. Until approximately December, I think it was '46.

Q. Then he came back to work for the company? A. With a light-duty slip, from the doctor.

Q. So then you transferred him outside the bargaining unit to work as a checker, is that correct? A. Yes.

Q. Was that in December of '46, or after that? A. Well, I don't recall exactly what date, it was about the time he returned to work. I think it was approximately the first of December.

Q. Well was he physically able to perform work as a machinist, at the time you transferred him to the work of a checker. A. I don't believe he was physically able at that time. That would be a long time ago.

* * * * * * * * * *

Q. (By Mr. Papps) Do you recall now, Mr.
110 Munger, whether or not Frazier was physically able to perform work as a machinist? A. He was not

Trial Examiner: When?

Mr. Papps: In September 1946, September 6, 1946.

The Witness: He returned to work in December, he was not able at that time.

Q. (By Mr. Papps) to perform work as a machinist, is that right? A. Yes.

Q. Was it for that reason you transferred him out of the bargaining unit? A. He was put on checking when he returned and at a later date he was put on salary as a checker.

Q. Put on checking is timekeepers work, isn't that correct. A. Right.

* * * * * * * * * *

115 Q. (By Mr. Papps) Did Frazier discuss with you the question of layoff at any time? A. The latter part of March he came to my office and wanted to know if his job was available. I told him it was available but he didn't meet the requirements of the present contract. The union had notified me that he was not a member in good standing.

Trial Examiner: Do you know whether or not his physical condition enabled him to handle the job in the maintenance unit, in view of the fact you testified he had been ill and was apparently on a light slip work back in '46, December thereabouts, do you know whether that was entered into consideration on the companies part.

The Witness: I am not saying they did try or didn't try to put him back in the unit before '58.

Trial Examiner: Did you consider whether he was sufficiently recovered from his past injuries or illness?

The Witness: I did not take it into consideration, I assumed he was able to work.

Trial Examiner: You don't know.

The Witness: No, we would have had to try him.

Trial Examiner: You would prefer to layoff somebody else, you say, at that point?

116 The Witness: Yes.

Q. (By Mr. Papps) When was it you first entered into an agreement with the Machinists Union, with regard to the question of a withdrawal card, if you recall, and seniority, Mr. Munger? A. I believe it was the contract prior to this contract that was just terminated.

Q. Would it be correct to say in 1952? A. About approximately '52.

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Q. (Interrupting.) That was the first time that that was entered into, a collective agreement, is that correct?

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117 The Witness: In 1952, we entered into a agreement with Local 1417 which provided in part, Article 5, Section 10a, page 8, that employees who are members of the bargaining unit at the time they were promoted or transferred to the salary payroll would accumulate
seniority in the bargaining unit if they maintained
118 membership in Local 1417, by taking a withdrawal
card at the time they transferred. The effect of the provision was to allow salaried employees, laid off salary payroll to bump back to the bargaining unit, if they took a card at the time they were transferred out of the unit. This provision carried over into our 1955 contract and is still in force.

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123

Donovan Randall

a witness recalled by and on behalf of General Counsel, being previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Slaight) Mr. Randall, you already testified, I believe, there were three committee members including the chairman of the committee Mr. Adams, who serviced the contract in the plant, is that correct? A. That's right.

* * * * * * * * * *

On the record.

You're what is known as a consolidated local, is that correct. Combining employees of more than one plant, amalgamated?

The Witness: That's right.

Trial Examiner: The way the union actually
124 carries out in each specific plant, you have officers for the local, and then each of the plant represented by the union in this particular local, they then see, like their own shop committee, to represent the union in the particular plant, is that correct?

The Witness: That's right.

Trial Examiner: You had such a shop committee in this plant?

The Witness: Yes, sir.

Trial Examiner: The chairman was Mr. Adams?

The Witness: Yes, sir.

Trial Examiner: Is it the function of this shop committee particular for Adams to oversee the administration of the contract, that the union had with the employer, is that correct?

The Witness: That's right.

* * * * * * * * * *

132

Cecil Frazier

a witness called by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

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On the record.

Let the record show the parties are stipulating to that Mr. Frazier was initiated in Local 1417 in March of 1946 and paid dues through September 1946. And that for the period from October through December of 1946 he was out of work and the union stamped his book with an
133 employed stamp, indicating that he continued his membership in good standing through December 1946. His dues book also shows payment beyond such period, if I stated the fact correctly.

Mr. Slaight: Yes, that is what the dues book show. I will so stipulate.

* * * * * * * * * *

Mr. Papps: May we likewise stipulate on page 3 of the dues book, in the first paragraph, this is a statement which notifies the members that delinquency for 3 months of payments of dues or assessments automatically cancels membership and all rights, privileges and benefits incident thereto. There is other written matter, I think that is the only thing that pertains to this.

Mr. Slaight: So stipulated.

Q. (By Mr. Papps) Actually Mr. Frazier, you hadn't paid any dues at all, that I know of, since December of 1946, is that correct? A. Well, I am not going to say, possibly there is three more months, I believe, should have been in the book, I paid for it.

Q. You paid dues? A. I paid three more months, I don't know whether they was stamped.

134 Q. Who did you pay them to?

A. The financial secretary.

Q. He didn't give you a stamp? A. I didn't have the book with me.

Trial Examiner: You're sure of that?

The Witness: I think there was three month, in '47, I believe, you find it in the record. Maybe I'm wrong, I don't think I am, it's possible. But I think I paid three months.

Mr. Papps: I think the witness is probably right, Your Honor, on this point, because the last dues were paid, that would be right, Your Honor, he is correct.

Trial Examiner: All right.

Mr. Papps: Our records reflect the witness joined the union in March of '46, and was dropped as a member in July of '48. Which counting the 90 days grace period, proceeding, it would be that, he paid dues in January or February, March and then he was delinquent commencing April, May, June and dropped in July as a member.

Trial Examiner: All right.

* * * * * * * * * *

139 Q. (By Mr. Papps) Now, to get this perfectly clear, you were laid off in February, actually from the job in the machinists checking job, is that correct? A. From the checking job.

Q. Yes. At that point you went to talk to Adams? A. Adams came and talked you me.

Q. You didn't hunt him up about a job? No, I didn't have to?

Q. He came to you and told you, you were ineligible for a job in the unit, is that right? A. That's right.

Q. Then you went to whom. Did you go to the company then? A. I went to my supervisor.

Q. That was Mr. Bennett? A. That was Mr. Robert Crow, he was my supervisor.

* * * * * * * * * *

140 Q. You talked to Crow about it? A. Yes, sir.

Q. And then Crow transferred you to another job after that? A. Yes, sir.

Q. And then you had a checkers job until April, well it was March 31st, wasn't it? A. I had a checkers job until the middle of March.

Q. You took your vacation then? A. That's right.

* * * * * * * * * *

145 Q. (By Mr. Papps) At any time prior to March 31, 1958, did you try to file a grievance in connection with your seniority, in connection with your job rights, in connection with your standing with the union or in the employ of the company?

* * * * * * * * * *

146 Q. (Mr. Papps) Did you file a grievance, sir? A. No, sir, I haven't.

Q. Never filed a grievance about your seniority? A. No, sir.

Q. In February, when you were first informed about your seniority, and the fact you were not welcome back in the bargaining unit—

Trial Examiner: (Interrupting.) Do we have to go over this time and time again. The witness is aware he didn't appear on the list and he never protested, is that correct?

The Witness: That's right.

Q. (By Mr. Papps) You never used the grievance provision in any event? A. Right.

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148 Trial Examiner: Mr. Slaight, what remedy are you seeking in this case?

Mr. Slaight: We are seeking a reinstatement, backpay for him here.

Trial Examiner: This company is out of business, what you're seeking for Frazier is back is back pay from the time he was out of work until July first as I recall. You're seeking an affirmative remedy, a contract—no contract was in existence at that point.

Mr. Slaight: I am seeking a decision on the contract.

Trial Examiner: I am asking you what kind of remedy you are seeking, what order are you seeking with
149 respect to the contract, just cease and decease?

Mr. Slaight: Yes. I think there is probably a similarity to the structure of the case. The plant was closed, his job has been completed and they will still find the contract was illegal, I do want to say that.

Tria Examiner: What you're seeking, is to find the contract was illegal, is no way of affirmative. If anything you can do about it.

Mr. Slaight: That's right. I didn't know the company had quit business until Mr. Papps informed me.

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General Counsel's Exhibit No. 1-C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD FOURTEENTH REGION

LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

and

CECIL FRAZIER, an Individual

and

THE ELECTRIC AUTO-LITE COMPANY, MT. VERNON FOUNDRY
DIVISION, *Party to the Contract*

Case No. 14-CB-574

COMPLAINT AND NOTICE OF HEARING

Local 1417 vs. Cecil Frazier

* * * * * * * * * *

V

On or about November 14, 1955, the Respondent and the Company executed a written collective bargaining agreement covering all matters pertaining to wages, hours, and other conditions of employment of the employees employed at the Company's Mt. Vernon Foundry Division in the following described unit:

> All employees engaged as Maintenance Men, Electricians, Sheet Metal Workers, and Machinists, but excluding employees in supervisory capacities, plant protection employees, office and factory clerical employees, and checkers.

By its terms said collective bargaining agreement was effective until September 1, 1958.

VI

The contract, referred to in Paragraph V above, contains among other things the following provisions relating to union security and seniority:

ARTICLE XVIII

All employees who on the date of signing of this Agreement are members of the Union in good standing in accordance with its constitution and bylaws, and all employees who become members after that date, shall, as a condition of employment, maintain their membership in the Union in good standing for the duration of this Agreement. The Company will be asked to take action under this clause only in the case of dues delinquency, and in such cases the Company will be advised, in writing of the delinquency and the individual will be allowed two weeks in which to correct it.

* * *

ARTICLE V

* * *

(10) (a) Any employee who has been or who is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall retain and accumulate his departmental seniority but not job seniority, providing he applied for a withdrawal card from the Union at the time he was promoted.

* * * * * * * * * *

General Counsel's Exhibit 1E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD FOURTEENTH REGION

LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

CECIL FRAZIER, an Individual

and

THE ELECTRIC AUTO-LITE COMPANY, MT. VERNON FOUNDRY DIVISION, *Party to the Contract*

ANSWER OF RESPONDENT

* * * * * * * * * *

5. Respondent admits the allegations of paragraph Five (V) thereof.

6. Respondent admits the allegations of paragraph Six (VI) to be substantially true thereof.

General Counsel's Exhibit 2

AGREEMENT

THIS AGREEMENT is made between the Mt. Vernon Foundry Division of Mt. Vernon, Illinois, Party of the First Part, and the International Association of Machinists, Local No. 1417, Mt. Vernon, Illinois, Party of the Second Part, hereinafter called the Union.

ARTICLE I

The Party of the First Part agrees to recognize the International Association of Machinists, Local 1417 as sole collective bargaining agency in all matters pertaining to wages, hours, and other conditions of employment at the Foundry, of all workers, engaged as Maintenance Men,

Electricians, Sheet Metal Workers, and Machinists. This agreement does not cover employees in supervisory capacities, plant protection employees, office and factory clerical employees, and checkers.

* * * * * * * * * *

ARTICLE III

(a) There shall be a committee of employees, including a Chairman, all of whom shall be employees of the Company, known as the Shop Committee, who will be recognized by the Company to take up all grievances in the following manner:

1.—All grievances shall be in writing

2.—Between the department foreman and the committee, if not settled

3.—Between the Superintendent and the committee, if not settled

4.—Between the Management and the committee, if not settled

5.—Between the Management, the committee and a representative of the International Union.

* * * * * * * * * *

ARTICLE V

(1) In laying off and recalling employees, seniority shall be recognized as departmental seniority in the following departments: Maintenance, Electrical and Sheet Metal.

(2a) In case of a general layoff the youngest men will be laid off first, and the oldest men to be first to be hired back if they can handle the work. Seniority of employees shall be established and in effect immediately upon the making of this Agreement. Seniority lists will be posted in January of each year and will be open for inspection and copy of same shall be furnished to the Chairman of the Union. Unless a written protest is made by men in active service

within thirty (30) days from date of posting of seniority list, dates shown thereon will not be thereafter changed.

(2b) In case of all layoffs and recalls the committee will be given ample time to check seniority lists to approve all such layoffs or recalls.

* * * * * * * * * *

(5) Any new employees hired after the date of this contract shall not have seniority rights until after thirty (30) calendar days from the date of employment. Then employees are to have all seniority rights as provided for in this Article. If any such employee is laid off during the thirty (30) day period, the Company is not required to rehire him.

(6) Any employee transferred from one department to another shall hold his seniority in his original department. Except as provided in other clauses of this Agreement, all transfers from one department to another are subject to the approval of the Shop Committee.

* * * * * * * * * *

(10) (a) Any employee who has been or who is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall retain and accumulate his departmental seniority but not job security, providing he applied for a withdrawal card from the Union at the time he was promoted.

* * * * * * * * * *

(11) (a) Employees shall not be removed from the seniority list except as provided in this Agreement or when they quit or have been dismissed for good cause.

* * * * * * * * * *

ARTICLE XVIII

All employees who on the date of signing of this Agreement are members of the Union in good standing in accord-

ance with its constitution and bylaws, and all employees who become members after that date, shall, as a condition of employment, maintain their membership in the Union in good standing for the duration of this Agreement. The Company will be asked to take action under this clause only in the case of dues delinquency, and in such cases the Company will be advised, in writing of the delinquency and the individual will be allowed two weeks in which to correct it.

Any employee who interferes with harmonious relations between the Company and the Union will be interviewed by the Plant Manager.

* * * * * * * * * *

ARTICLE XXI

This contract shall remain in full force and effect until September 1, 1958 and thereafter for successive yearly periods, unless notice in writing is given by either party at least sixty (60) days prior to September 1, 1958 or any succeeding September 1 expressing a desire to cancel, modify or amend it. The written notice shall contain all changes or amendments desired, after which a conference date shall be mutually agreed upon.

Nov. 14th,1955

For the Union:

John S. Rich,
Business Representative

Virgil H. Pigg
Roy E. Adams
Andrew Corsere

For the Company:
R. W. Munger

* * * * * * * * * *

General Counsel's Exhibit No. 3

CONSTITUTION OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

* * * * * * * * * *

HONORARY WITHDRAWAL CARDS

Sec. 18. Any member who leaves the trade because of illness, or obtains employment outside the trade or industry, or obtains a supervisory position above the rank of working foreman, or because of circumstances over which the member has no control is compelled, as a condition of employment, to join another labor organization, or enters the Armed Forces of the United States or Canada, and upon complying with the conditions hereinafter set forth, may be issued an honorary withdrawal card by and with the approval of the L.L. in which membership is held.

Application for withdrawal card, accompanied by a fee of 25c, shall be made to the F.S. or S.T. of the L.L. who, after the application has been approved by the L.L., shall issue same, bearing the L.L. seal on a form designed and supplied by the G.L.

No application will be granted until all fines, dues and special levies charged against the member have been paid in full to date of application.

Persons discontinuing their membership by accepting withdrawal cards will not be entitled to any benefits or permitted to attend metings or participate in any of the business of the I.A.M. They shall not violate any of the laws or decisions of the G.L. or L.L. under penalty of having their withdrawal card cancelled.

* * * * * * * * * *

General Counsel's Exhibit No. 5

AGREEMENT

THIS AGREEMENT is made between the Mt. Vernon Foundry Division of Mt. Vernon, Illinois, Party of the First Part, and the International Molders & Foundry

Workers Union of North America, Local No. 331, Mt. Vernon, Illinois, and the International Association of Machinists, Local No. 1417, Mt. Vernon, Illinois, Parties of the Second Part.

* * * * * * * * * *

ARTICLE I

The Party of the First Part agrees to recognize the Molder's Local No. 331 as a sole collective bargaining agency in all matters pertaining to wages, hours, and other conditions of employment at the Foundry, of all workers engaged in the production of castings, such as molders, coremakers, apprentices, and Non-Journaymen, including cupola tenders, furnace men, sand-blast-men, chippers, grinders, sand cutters, helpers, laborers, carpenters, crane-operators, and pattern makers, and to recognize the Machnists' Local 1417 as a sole collective bargaining agency in all matters pertaining to wages, hours, and other conditions of employment at the Foundry of all maintenance-men, machinists, and electricians.

* * * * * * * * * *

ARTICLE III

(a) There shall be a committee of four (4) employees, including a Chairman, all of whom shall be employees of the Company, known as the Shop Committee, who will be recognized by the Company to take up all grievances in the following manner:

1. Between the department foreman and the committee, if not settled

2. Between the Superintendent and the committee, if not settled

3. Between the management and the committee, if not settled

4. Between the management, the committee and a representative of the International Union, if not settled

5. Jointly submitted to the Department of Labor, State of Illinois, for arbitration, the decision of the Arbitrator shall be final and binding on both parties. This shall not apply to wages.

* * * * * * * * * *

ARTICLE V

(a) Seniority of employees shall be in the department where employed, and will start on the date this Company took over the payroll. Seniority of employees shall be established and in effect immediately upon the making of this agreement. Seniority lists will be posted in January of each year and will be open for inspection and copy of same shall be furnished to the Chairman of the Union. Unless a written protest is made by men in active service within thirty (30) days from date of posting of seniority list, dates shown thereon will not thereafter be changed.

(b) When it becomes necessary to reduce the force, seniority as set forth in Paragraph (a) of this Article will govern, the men affected to take the rate of the job to which they are assigned. In the restoration of forces, senior laid-off men will be given preference in returning to service, if available within one week (1), and shall be returned to their former position if possible.

* * * * * * * * * *

ARTICLE X

(a) Employees accepting positions as foremen, or men assigned to special duties outside the scope of this agreement shall retain their seniority where they last held seniority rights, except employees eliminated from the service for cause.

* * * * * * * * * *

ARTICLE XXI

* * * * * * * * * *

(b) Maintenance of Membership: All employees who, on February 1, 1946, are members of the Union in good

standing in accordance with its constitution and by-laws, and all employees who become members after that date, shall, as a condition of employment, maintain their membership in the Union in good standing for the duration of the collective agreement in which this provision is incorporated, or until further order of the board.

* * * * * * * * * *

ARTICLE XXIII

This contract automatically removes itself each twelve months hereafter unless the Union or Company notifies the other in writing of its desire to revise or terminate the agreement at the next expiration date, at least thirty (30) days prior to said expiration date. Such written action shall contain all changes or amendments desired, after which conference date shall be mutually agreed upon.

Dated this 12th day of March, 1946.

Mt. Vernon Foundry Division

By W. W. Shinmore

International Moulders & Foundry Workers Union of North America, Local No. 332

By James W. Cann
George N. Kite
Alva Dodson, Sr.
Burrell Dodson
Ed Heisler

International Association of Machinists, Local No. 1417

By Robert C. Wagner
Leonard J. Velker

* * * * * * * * * *

Respondent's Exhibit No. 2

SENIORITY LIST:
MAINTENANCE DEPARTMENT:

Maint.: First Shift:

NAME	CLOCK NO.	Starting Date
Hulin McGuire	98100	3-20-46
Arthur Ross Horton	98101	4-29-46
Clifford Ferguson	98102	4-30-46
Edward Matthews	98103	6- 4-46
Roy Adams	98104	6-24-46
Warner Johnston	98105	6-24-46
James Burnette	98106	6-24-46
Carl Wimberly	98107	6-25-46
Donald DeMont	98109	7 1-46
Wallace Hauk	98113	8-27-46

Electricians:

Louis Einchelse	98119	2-11-46
Carl Williams	98120	2-25-46
Archie Clemins	98121	3- 7-46

Maint.: Second Shift:

NAME	CLOCK NO.	Starting Date
Gary Badgett	98110	7-31-46
Clarence Tucker	98111	8- 5-46
Sumner Tucker	98112	8-26-46
Ernie Kincaid	98114	8-27-46
Edwin Milt	98115	8-27-46
Leslie Ayers	98116	8-28-46
Louis McFarlan	98117	9- 9-46
Kenneth Lyle	98118	9-23-46
Elvin Burton	98125	10- 7-46
Gale Riley	98124	10- 9-46
Virgil Pigg	98124	10-10-46
Lee Kercher	98127	10-12-46

Sheet Metal:

Warren Davis	98123	3-16-46

Respondent's Exhibit No. 3

February 18, 1948

DEPARTMENT SENIORITY LIST
MAINTENANCE DEPARTMENT

Maint.: First Shift:

NAME	CLOCK NO.	Dept. Starting Date
Hulin McGuire	98100	3-20-46
Arthur Ross Horton	98101	4-29-46
Clifford Ferguson	98102	4-30-46
Edward Matthews	98103	6- 4-46
Roy Adams	98104	6-24-46
Warner Johnston	98105	6-24-46
James Burnette	98106	6-24-46
Carl Wimberly	98107	6-25-46
Donald DeMont	98109	7- 1-46
Wallace Hauk	98113	8-27-46
[Illegible]	98122	12-29-47

Electricians:

Louis Einchelse	98119	2-11-46
Carl Williams	98120	2-25-46
Archie Clemins	98121	3- 7-46
Virgil Pigg	98124	10-23-47

Maint.: Second Shift:

NAME	CLOCK NO.	Dept. Starting Date
Gary Badgett	98110	7-31-46
Clarence Tucker	98111	8- 5-46
Sumner Tucker	98112	8-26-46
Ernie Kincaid	98114	8-27-46
Edwin Milt	98115	8-27-46
Leslie Ayers	98116	8-28-46
Kenneth Lyle	98118	9-23-46
Elvin Burton	98125	10- 7-46
Gale Riley	98124	10- 9-46
Lee Kercher	98127	10-12-46
Berthold McKinney	98129	12-29-47
Kirby Milt	98117	12-29-47
Thomas Willmore	98128	12-29-47
Arthur J. Hayes	98130	2- 2-48

Sheet Metal:

Warren Davis	98123	8-15-46
Andrew Corsere	98108	5-15-47

STATEMENT OF QUESTIONS PRESENTED

The issues in this case were identified by the parties in a prehearing conference stipulation (J.A. 2). We believe that the identified issues comprehend primarily the following questions:

1. Whether the closing of a plant moots a cease-and-desist order pertaining to that plant.

2. Whether, where the right to a job is controlled by contractual seniority, an employee can be granted back pay for alleged discriminatory denial of that job to him if the employee did not in any event have the requisite seniority entitling him to displace the employee holding the job.

3. Whether, in the circumstances of this case, the provision of the agreement, conditioning the retention and accumulation of seniority by an employee while outside the unit upon a requirement that the employee obtain a withdrawal card from the union, is invalid as discrimination in employment encouraging union membership.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,175

LOCAL LODGE NO. 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review and Set Aside and on Request to Enforce An Order of the National Labor Relations Board

---

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Local Lodge No. 1417, International Association of Machinists, AFL-CIO, to review and set aside an order of the National Labor Relations Board issued against it on May 13, 1959, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, *et seq.*). In its answer the Board requested enforcement of its order against the Union. The jurisdiction of this Court is based on Section 10(f) of the Act. The Board's decision and order are reported at 123 NLRB No. 143 (J.A. 4-8).

STATEMENT OF THE CASE

I. The Facts

The Electric Auto-Lite Company, Mt. Vernon Foundry Division, acquired its plant at Mt. Vernon, Illinois, in January 1946 (Tr. 42).[1] The Company ceased operating this plant on July 31, 1958, when a "final shutdown of plant activities" took place and the plant closed (J.A. 15, 17; 24, 49, 57, Tr. 72-73).[2]

On March 12, 1946, about three months after it acquired the plant, the Company recognized the Union as the exclusive bargaining representative of a unit of employees composed of the machinists, maintenance men, and electricians at the plant (J.A. 11, 65, 30). Excluded from this unit were timekeepers or checkers among others (J.A. 11; 27-28). The collective bargaining agreement which was entered into between the Company and the Union on March 12, 1946, provided that: "Seniority of employees shall be in the department where employed, and will start on the date this Company took over the payroll. Seniority of employees shall be established and in effect immediately upon the making of this agreement" (J.A. 11; 66). The agreement further provided that (J.A. 12; 66):

> Employees accepting position as foremen, or men assigned to special duties outside the scope of this agreement shall retain their seniority where they last held seniority rights, except employees eliminated from the service for cause.

The latter provision continued in existence until 1952, when it was changed by the collective bargaining agree-

---

1 "Tr." refers to those parts of the transcript of record not printed in the Joint Appendix. "Tr." references are printed in Appendix A of this brief, *infra*, pp. 31-33.

2 In this statement of facts, references preceding the semicolon are to the findings and those following the semicolon are to the supporting evidence; where no semicolon appears, the reference is to uncontradicted evidence.

ment entered into in that year to provide that (J.A. 12; 53, 62):

> Any employee who has been or who is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall retain and accumulate his departmental seniority but not job seniority, providing he applied for a withdrawal card from the Union at the time he was promoted.

The 1952 provision was also included in the agreement entered into on November 14, 1955 (J.A. 12; 62). The 1955 agreement expired by its terms on September 1, 1958 (J.A. 63, 22, 57), the plant having closed on July 31, 1958 (*supra*, p. 2).

Cecil Frazier began his employment with the Company at the Mt. Vernon plant in January 1946 as a machinist (J.A. 11, 14; 26, Tr. 42). Nine months later, in September 1946, Frazier ceased working as a machinist because of a disabling injury and was absent from work until December 1946 (J.A. 14; 51-52). In December 1946, still incapacitated for work as a machinist, Frazier returned to light duty as a timekeeper, and in January 1947, for reasons of physical disability, he was transferred from the unit of machinists to continue to work as a timekeeper (J.A. 14; 51-52, 27-28).

Cecil Frazier worked as a timekeeper from December 1946 through March 31, 1958 (J.A. 14; 30, 35). In February 1958, a cutback in production necessitated reducing man power, and the Company decided to abolish Frazier's particular job as a timekeeper (J.A. 14-15; 43). At that time, Wayne Bennett, a Company official who then held the position of assistant to the operations manager, spoke to Roy Adams, an employee of the Company and also Chairman of the Shop Committee, the body charged with the responsibility of administering the agreement on behalf of the Union (J.A. 14-15 and n. 4; 42-43, 61). Based

on the assumption that Frazier was senior to all but two or three of the employees then working in the maintenance unit by virtue of accumulation of maintenance department seniority during the time that he worked outside the unit as a timekeeper (J.A. 46, 44, 45, Tr. 97-98), Bennett informed Adams that the Company proposed to lay off Frazier as a timekeeper and to transfer him to the maintenance unit (J.A. 14-15; 43).[3] Frazier's transfer to the maintenance unit would necessitate the displacement and discharge of an employee then working within that unit (J.A. 15; 44, 46). Adams stated that Frazier was ineligible for transfer to the maintenance unit because he did not have a withdrawal card (J.A. 15; 43-44, 47); "He said the men would not work with him. His main reason was it . . . [would] necessitate laying off a man who has been paying dues for the past 10 or 12 years. This man would be out of a job. Cecil would come back in and take this man's job, he hasn't been paying dues for the past 10 or 12 years. That wouldn't go over very well with the men, especially the ones that were laid off" (J.A. 15; 48). About the same time Adams personally informed Frazier that he could not return to the maintenance unit because he lacked a withdrawal card (J.A. 15; 29, 56).

The Company did not lay off Frazier in February 1958 but assigned him to work at another then available position as a timekeeper (J.A. 15; 44, 56). Thereafter, a further cutback in production caused the Company to abolish this position (J.A. 15; 44). Frazier was informed in mid-March that he was to be laid off, as he was, on March 31, 1958 (J.A. 15; 30, 36).

On March 31, Frazier spoke to the Company's operations manager, and "asked him if my job was available in machinists, as far as the company was concerned"; the

---

[3] The agreement provides that "In case of all layoffs and recalls the committee will be given ample time to check seniority lists to approve all such layoffs or recalls" (J.A. 62).

manager replied that "it was," but that "he had been informed by the union I [Frazier] didn't have a withdrawal card" (J.A. 15; 30-31). As explained by the manager, Frazier "came to my office and wanted to know if his job was available. I told him it was available but he didn't meet the requirements of the present contract" (J.A. 52, Tr. 118-119, 121), the requirement being that to "accumulate seniority in the bargaining unit" upon promotion or transfer to an excluded position the employee was to obtain a withdrawal card (J.A. 53, Tr. 121). As in February, to return Frazier to the maintenance unit at this time would necessitate the layoff of an employee then at work within the unit (J.A. 52). In April 1958 there were eight or nine general maintenance men within the unit (J.A. 50), in contrast with the 22 in 1947 (J.A. 68-69, 46-47) and 26 in 1948 (J.A. 70-71, 47). At the time that the Company expressed its willingness to transfer Frazier to the maintenance unit it did not know whether or not his disabling injury, which caused his original separation from the unit (*supra,* p. 3), still incapacitated him for work as a machinist (J.A. 52).

Frazier had been a member of the Union during the period of his employment as a machinist within the maintenance unit, but he was dropped from membership in July 1947 for failure to pay dues after March 1947 (J.A. 14; 24-25, 54-55). For the full twelve-year period of their contractual relations, the collective bargaining agreements between the Company and the Union provided for union security substantially in the following terms (J.A. 11; 62-63, 66-67):

> All employees who on the date of signing of this Agreement are members of the Union in good standing in accordance with its constitution and bylaws, and all employees who become members after that date, shall as a condition of employment, maintain their membership in the Union in good standing for the duration of this Agreement. The Company will be

> asked to take action under this clause only in the case of dues delinquency, and in such cases the Company will be advised, in writing of the delinquency and the individual will be allowed two weeks in which to correct it.

From the Union's recognition as the representative in March 1946 through the closing of the plant on July 31, 1958, all employees who worked within the unit covered by the agreements were members of the Union (J.A. 5, n. 1; 25). The Company's assistant to the operations manager, the official who represented the Company in its dealings with the Union, testified that: "There is a clause, after 30 days it is necessary they belong to the union. You hire them and right after 30 days they become members" (J.A. 49).

II. The Board's Conclusions

The Board found that the Union violated Section 8(b)(2) and (1)(A) of the Act (J.A. 5). As to the agreement, the Board stated that (J.A. 5):

> The contract in question did not contain a union-security clause requiring employees in the bargaining unit to become union members. It did, however, contain a maintenance of membership clause. The contract also contained a seniority clause providing for the retention and accumulation of seniority in the unit by only those employees transferred out of the unit who had applied for withdrawal cards from the Respondent [Union]. Because under the Respondents' [Union's] constitution only union members are eligible to obtain withdrawal cards such a clause thereby discriminated in favor of union member employees. We therefore find that the Respondent's maintenance and enforcement of this seniority provision violated Section 8(b)(2) and (1)(A) of the Act.

As to Frazier, the Board stated that (J.A. 5):

> As Frazier was denied a transfer back into the unit because of Respondent's [Union's] maintenance and

> enforcement of this illegal contract provision, . . . Respondent [Union] caused the Company, in the performance of the contract, to discriminate against Frazier, and the Respondent [Union] thereby violated Sections 8(b)(2) and (1)(A).

The Board emphasized that it reached its conclusion in reliance "solely" upon the foregoing "facts" (J.A. 5).

III. The Board's Order

The Board's order requires the Union to cease and desist from (J.A. 6):

> (a) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Electric Auto-Lite Company, which unlawfully discriminate in regard to the acquisition, retention or restoration of seniority rights of employees of said Company;
>
> (b) Causing, or attempting to cause, the aforenamed Company to discriminate against employees in violation of Section 8(a)(3) of the Act;
>
> (c) In any like or related manner restraining or coercing employees of the aforenamed Company in the exercise of rights guaranteeed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

The Board did not order Frazier's reinstatement, as the "Company no longer operates its Mt. Vernon plant . . ." (J.A. 17). It ordered that Frazier be made whole for any loss of pay sustained by him "for the period from March 31, 1958, the date of the discrimination, until such time on or before July 31, 1958 (the date of the closing of the Company's plant) when Frazier would normally have been terminated . . ." (J.A. 6).

Finally, the Board ordered that the Union post notices "at its offices" stating that (J.A. 7-8):

WE WILL NOT restrain or coerce employees of The Electric Auto-Lite Company in the exercise of rights guaranteed by Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause The Electric Auto-Lite Company to discriminate against its employees in regard to seniority or otherwise in violation of Section 8(a)(3) of the Act.

WE WILL make whole CECIL FRAZIER for any loss of earnings he may have suffered as a result of the discrimination against him.

STATEMENT OF POINTS

The Board erred in:

1. Entering a cease-and-desist order although *in futuro* orders had been mooted by the closing of the plant.

2. Entering a back pay order in favor of an employee based on alleged discriminatory denial of a job to that employee where he did not have the requisite contractual seniority entitling him to displace the employee holding the job.

3. Finding that the provision of the agreement conditioning retention and accumulation of seniority upon the withdrawal card requirement is invalid as discrimination in employment encouraging union membership.

SUMMARY OF ARGUMENT

I

The cease-and-desist provisions of the order, and the corresponding parts of the notice, pertain to a plant which has been closed. These provisions of the order have nothing to operate on. They are moot and cannot be enforced.

II

The back pay order in favor of Frazier can only be valid if Frazier had contractual seniority entitling him, upon his layoff as a timekeeper, to return to the maintenance unit and to displace an employee then working within the unit. Frazier could not be said to have been discriminatorily denied the job, if he was not entitled to it because he had less seniority than the employee holding the job.

The only basis upon which Frazier could be said to have greater seniority than the incumbent is upon the assumption that, under the agreement existing when Frazier was laid off as a timekeeper, he accumulated seniority within the maintenance department for the full period that he worked outside it as a timekeeper. But the agreement granted an employee transferred from the unit the right to "retain and accumulate his departmental seniority . . ., *providing* he applied for a withdrawal card from the unit at the time he was promoted" (*supra*, p. 3, emphasis supplied). Frazier did not meet the proviso. Acquisition of seniority was expressly conditioned upon the proviso. And Frazier cannot establish seniority under this agreement whether the proviso is valid or invalid. If valid, Frazier obviously gains nothing from the agreement; if invalid, he still gains nothing, for if the proviso falls, so must any accumulation of seniority which is conditioned upon the proviso. The proviso is an essential part of the grant of seniority and cannot be severed from it. Under either alternative, therefore, Frazier takes nothing from the agreement. Accordingly, Frazier could not have been discriminatorily deprived of his right to return to the maintenance unit upon his layoff as a timekeeper, for he had no such right.

Even if the right under the agreement to "retain and accumulate" departmental seniority is severable from the withdrawal card condition, Frazier still did not have sufficient seniority to return to the mairtenance unit, for the

employee within the unit whom he was to displace had greater seniority than Frazier. That employee had at least ten year's departmental seniority (*supra*, p. 4). At best Frazier had departmental seniority of seven years and three months.

III

In the circumstances of this case the provision of the agreement conditioning retention and accumulation of seniority while outside the unit upon the withdrawal card requirement is not invalid as discrimination in employment encouraging union membership. For there was no encouragement of union membership in the statutory sense. First, there is no finding, nor evidence of such compelling character as to render a finding superfluous, that the Company's motive in concurring in the provision was to encourage union membership. Second, even if the Company's motive is irrelevant, encouragement of union membership was not the natural and foreseeable consequence of adoption of the provision. All the employees within the unit had been members of the Union for five years and nine months before the provision was adopted. The provision could hardly effectively encourage a condition which was already fully manifest without it. Lastly, the agreement in practice established a union shop, and, in consequence, since the employees were obligated to become union members, the seniority provision could not be said to encourage what was in any event compelled.

ARGUMENT

I. THE CEASE-AND-DESIST PROVISIONS OF THE ORDER, AND THE CORRESPONDING PROVISIONS OF THE NOTICE, ARE MOOT BECAUSE THE COMPANY HAS CLOSED THE PLANT

The Board's order requires the Union to cease and desist from "Performing, maintaining, or otherwise giving effect" to discriminatory seniority provisions of "any agreement" with the Company, from causing or attempting to

cause the Company to discriminate, and from in "any like or related manner" restraining or coercing the Company's employees (*supra,* p. 7). Corresponding to these provisions of the order, the Union is required to post notices informing its members that "We Will Not" restrain or coerce the Company's employees or cause or attempt to cause the Company to discriminate against them (*supra,* p. 8).

This order arises from, and is confined to, the Company's operation of its plant at Mt. Vernon, Illinois. The Company ceased operating this plant on July 31, 1958, when a "final shutdown of plant activities" took place and the plant closed (J.A. 15, 17; 24, 49, 57, Tr. 72-73). As the trial examiner observed, "This Company is out of business . . ." (J.A. 57).

The Board's order thus beats a dead horse. The Union is ordered to cease "Performing, maintaining, or otherwise giving effect" to discriminatory seniority provisions of "any agreement" with the Company. The only agreement with the Company had already expired at the time of the hearing (*supra,* p. 3). And since the plant has been closed, the Union can no longer contract with the Company at all, with the result that the order requires the Union to cease "Performing, maintaining or otherwise giving effect" to an agreement it does not have and cannot procure. This Court has refused to enforce an order against "maintaining, enforcing, or giving effect to" an agreement after it has expired. *U.M.W.* v. *N.L.R.B.,* 87 App. D.C. 230, 184 F. 2d 392, 393, cert. denied, 340 U.S. 934, denying enforcement of paragraph 1(d) of the order, 83 NLRB 916, 922. To enjoin performance of an agreement which does not exist and cannot be entered into is to operate *in vacuo.*

The same is true of the order's requirements that the Union desist from causing or attempting to cause the Company to discriminate, or from in "any like or related man-

ner" restraining or coercing the Company's employees. Since the plant is closed, and the Company no longer has employees, it is impossible to cause or attempt to cause the Company to discriminate against its employees, or to restrain or coerce them. And those provisions of the notice which correspond with the cease-and-desist provisions of the order suffer from the same infirmity. An order cannot require notification that "We Will Not" engage in certain conduct when the plant to which the notice pertains has been shut down. One does not medicate a corpse.

In short, these provisions of the order are moot, and cannot therefore be enforced. Plant closure moots *in futuro* orders. *N.L.R.B.* v. *Grace Co.*, 184 F. 2d 126, 130-131, 189 F. 2d 258 (C.A. 8); *N.L.R.B.* v. *Reynolds Corp.*, 155 F. 2d 679, 681-682, 168 F. 2d 877 (C.A. 5). The "cease and desist parts of the order have nothing to operate on" (155 F. 2d at 681); they are "inoperative and impossible to enforce" (184 F. 2d at 131). And, of course, judicial decrees cannot be entered to enforce moot orders, for there is no judicial power to decide moot questions. *United States* v. *Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 466, 475-477; *St. Pierre* v. *United States*, 319 U.S. 41.

II. CECIL FRAZIER DID NOT QUALIFY UNDER THE AGREEMENT FOR TRANSFER TO THE MAINTENANCE UNIT UPON HIS LAYOFF AS A TIMEKEEPER; HIS RIGHT TO TRANSFER TO THE UNIT DEPENDS EXCLUSIVELY UPON HIS CONTRACTUAL SENIORITY; IF THE AGREEMENT IMPOSES A DISCRIMINATORY REQUIREMENT UPON THE ACQUISITION OF SENIORITY, THE CONSEQUENCE IS TO INVALIDATE THE AGREEMENT, BUT NOT TO CONFER SENIORITY WHICH THE CONTRACT HAS WITHHELD

The provision of the Board's order which is not moot is the requirement that Cecil Frazier be made whole for any loss of pay sustained by him "for the period from March 31, 1958, the date of the discrimination, until such time on or before July 31, 1958 (the date of the closing of the Company's plant) when Fraizer would normally have been

terminated . . ." (J.A. 6). This order is based on two determinations: (1) "The withdrawal card requirement in the contract as a condition to continuing seniority is illegal" (J.A. 15); (2) but for the illegal condition, Cecil Frazier had "company seniority" which would "enable Frazier to bump a less senior employee in the [maintenance] unit" (J.A. 15). Based on these two determinations, the Board concluded that, "As Frazier was denied a transfer back into the unit because of . . . [the Union's] maintenance and enforcement of this illegal contract provision, . . . [the Union] caused the Company, in the performance of the contract, to discriminate against Frazier . . ." (J.A. 5).

The vital element upon which this line of reasoning fails is the Board's assumption that Frazier had contractual seniority, entitling him to return to the maintenance unit upon his layoff as a timekeeper, of which he was discriminatorily deprived. To be sound, each of two branches of the Board's reasoning must be valid: (1) Frazier had contractual seniority which entitled him to return to the maintenance unit upon his layoff as a timekeeper; (2) Frazier was discriminatorily denied the right to exercise the seniority which the agreement conferred upon him. For the purpose of this part of our argument we assume the validity of the second branch of the Board's reasoning (but see *infra* pp. 22-28). It is the invalidity of the first branch of the Board's reasoning—that Frazier did have contractual seniority entitling him to return to the maintenance unit—which is our present concern. We shall show that (1) as applicable in this case, seniority is exclusively contractual, (2) Frazier's right upon his layoff as a timekeeper to displace an employee then working within the maintenance unit depended upon the contract's conferment upon him of that right based on his having greater contractual seniority within the unit than the employee he was to displace; (3) to have greater seniority within the unit, Frazier must rely upon the right under the contract to "re-

tain and accumulate his departmental seniority" while out of the unit, but this right was inextricably conditioned upon the withdrawal card requirement which Frazier did not meet, and since the condition is an essential part of the right to "retain and accumulate" seniority, Frazier cannot acquire the right and disregard the condition, and (4) even if the right and the condition are severable, Frazier still did not have greater seniority than the employee within the unit whom he was to displace.

In short, unless Frazier had a right to return to the maintenance unit, he had nothing of which he could be discriminatorily deprived. A person cannot be divested of something he does not possess. We now show that Frazier had no such right.

1. "Seniority arises only out of contract or statute. An employee has 'no inherent right to seniority in service. . . .'" *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 53, n. 21. "Barring legislation not here involved,[4] seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry." *Aeronautical Industrial District Lodge 727* v. *Campbell,* 337 U.S. 521, 526. See also, *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338-339. As elaborated in *Elder* v. *New York Central R. R. Co.,* 152 F. 2d 361, 364 (C.A. 6):

> The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived. The right, however, is not inherent. It must stem either from a statute or a lawful administrative regulation made pursuant thereto, or from a contract

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[4] For example, seniority rights are conferred upon servicemen by Section 9 of the Universal Military Training and Service Act. 50 U.S.C. § 459. Another example is the Telegraph Merger Act (57 Stat. 5, 47 U.S.C. § 222), Section 222(f)(5) of which provides that, upon the merger of telegraph carriers, the employees for certain purposes shall retain the seniority they had with the carrier by which they were employed before merger. The National Labor Relations Act of course confers no seniority rights.

> between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer. The fact that he was not a member of the union labor organization which lawfully bargained for him and for all other employees of the company neither strengthens nor weakens his position. His individual seniority rights were both created and limited by the bargain which was made for and was binding upon all employees for whom it was made.

And so, "It has been firmly established that seniority is a contract right, arising solely from contract and subject to change with the contract, and that an employee has no inherent right to seniority in service." *Fagan* v. *Pennsylvania R.R. Co.*, 173 F. Supp. 465, 470 (M.D. Pa.).

The right of an employee transferred from a unit to return to it is a preeminent instance of a seniority question which the contract controls. It is universally recognized that whether an employee, who has been promoted or transferred from a unit, is entitled to return to the unit upon his layoff from the excluded position, is a matter which depends upon what, if any, seniority status within the unit the contract grants him.[5] All parties to this pro-

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[5] The way in which collective bargaining agreements resolve this question ranges the spectrum: some agreements provide that upon transfer from the unit to an excluded position the employee forfeits all seniority within the unit; others provide that employees retain the seniority that they had upon transfer, but do not accumulate seniority within the unit during the period that they are working outside it; others provide that employees retain their seniority within the unit, and accumulate further seniority within the unit while outside it, but accumulation is limited to a fixed period, for example, one year; still others provide that employees retain their seniority within the unit and

ceeding knew this. Frazier himself predicated his claim to return to the maintenance unit "Under the terms of the agreement" (Tr. 56) "[a]ccording to my seniority when I left there" (J.A. 40, see also J.A. 38-39). The Company first proposed to return Frazier to the maintenance unit upon his layoff as a timekeeper based on the assumption that under the existing agreement Frazier was senior to all but two or three of the employees then working in the unit by virtue of full accumulation of maintenance department seniority during the time that he worked outside the unit as a timekeeper (J.A. 46, 44, 45, Tr. 97-98). The Union resisted Frazier's return to the unit upon the ground that Frazier had not fulfilled the withdrawal card condition which the contract placed upon accumulation of seniority (J.A. 43-44, 47, 48, 29). The Company concurred because it recognized the contractual validity of the Union's position (J.A. 49, 52, Tr. 118-119, 121). And counsel for the General Counsel, in his brief to the trial examiner, stated that "There is no question but that employees do not have any statutory or absolute right to seniority. Likewise, even under agreements providing for seniority, employees not covered by the contract have no statutory or contractual rights to seniority in the unit not so covered.

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accumulate further seniority while outside it for the full period that they work in the excluded position. Collective Bargaining Provisions, Seniority, Bull. 908-11, U.S. Dept. of Lab., Bur. Lab. Stat., 41-47 (1949); Union Contract Clauses, Commerce Clearing House, ¶ 51,732 (1954); Basic Patterns in Union Contracts, 75:10-10(a) (Bur. Natl. Aff., 4th ed. Oct. 1957). Where an agreement is silent upon the subject, most arbitrators, but not all, construe the agreement to imply that employees retain the seniority they had upon transfer but do not accumulate seniority within the unit for the period they are working outside it. *Champion Rivet Co.*, 32 LA 892, 893; *Reliance Electric & Engineering Co.*, 31 LA 200, 203-206; *Aermotor Co.*, 30 LA 663, 664-666; *F.H. Noble & Co.*, 28 LA 641, 644-648; *Pacific Intermountain Express Co.*, 23 LA 440, 446-447; *Torrington Co.*, 22 LA 704, 705-706; *Singer Mfg. Co.*, 22 LA 492, and 22 LA 13, 17-18; *Wico Electric Co.*, 14 LA 916; *Illinois Malleable Iron Co.*, 14 LA 537, 540-541; *Chamberlin Co. of America*, 13 LA 739, 741-742; *Corning Glass Co.*, 12 LA 1033, 1035-1036; *Metal Glass Products Co.*, 12 LA 70, 71-73; *Dwight Mfg. Co.*, 10 LA 786, 789-790; *Acme Backing Corp.*, 9 LA 963. ("LA" refers to the Labor Arbitration Reports published by the Bureau of National Affairs.)

Thus, it is clear that the Company and the Respondent [Union] could have, had they so desired, provided for the forfeiture of seniority of all employees transferred out of the unit" (p. 8).

Accordingly, as Frazier's right to return to the maintenance unit is exclusively contractual, we now show that Frazier had no right to return to the unit under the terms of the agreement, and that to invalide those terms is not to create a right which the agreement withheld.

2. When Frazier transferred from the maintenance unit in January 1947 to the excluded position of timekeeper, the then existing agreement provided in relevant part that "men assigned to special duties outside the scope of this agreement shall *retain* their seniority where they last held seniority rights" (*supra*, p. 2). The agreement further provided that "Seniority of employees shall be in the department where employed, and will start on the date this Company took over the payroll" (*ibid.*). Since the Company acquired the plant in January 1946 (*ibid.*), and Frazier began working in the maintenance department at that time (*supra*, p. 3), his seniority in the maintenance department commenced in January 1946. When Frazier transferred from the maintenance department one year later, in January 1947, he had accordingly one year's seniority in that department. It was this one year of departmental seniority which under the terms of the then existing contract Frazier was to *retain*. Were Frazier, more than eleven years later, upon his layoff as a timekeeper in March 1958, to return to the maintenance department, he would displace an employee then working within the department who had at least ten year's departmental seniority (*supra*, p. 4). Had the agreement remained unchanged, Frazier would obviously have no right to displace an employee who had ten times his seniority.

Hence, Frazier must rely upon the agreement in existence at the time of his layoff in March 1958, the relevant

terms of which had first been agreed upon in 1952, five years after Frazier had transferred from the unit (*supra*, pp. 2-3). This agreement provided that (*supra*, p. 3):

> Any employee who has been or who is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall *retain and accumulate* his departmental seniority but not job seniority, *providing* he applied for a withdrawal card from the Union at the time he was promoted. [Emphasis supplied.]

This agreement, in addition to providing that the transferred employee shall *retain* seniority, further provided that he shall also *accumulate* seniority. But the grant of this new right of accumulation was explicitly conditioned by the proviso which stipulated that the employee fulfill the withdrawal card requirement. Yet the Board would credit Frazier with *accumulated* seniority without his meeting the condition upon its grant. The condition was an essential ingredient of the grant. Whether or not the condition was valid, it was still an indispensable part of the bargain, and no one is free to take the benefit of a bargain without accepting its burden. Especially is this true of a person in Frazier's class who, at the time of the contract, was not even within the unit for which the Union bargained, and who was therefore altogether the beneficiary of a windfall. For the Board to credit Frazier with accumulated seniority, but to dispense with the condition upon its grant, is for the Board to write a contract that the parties never wrote for themselves, and to create rights which only the parties are authorized to bring into being. The Board, no more than any other adjudicatory body, is empowered to do this.

This is settled law. The Restatement of Contracts declares the rule to be that, "where any part of a bilateral bargain is illegal, no promise can be enforced unless not only that promise is legal but a corresponding legal promise is, by the terms of the bargain, apportioned as a

consideration therefor, nor even in that case if the illegal portion of the bargain is an essential part of it." Restatement, Contracts, § 607. In its Comment (a) upon that rule the Restatement explains in part that:

> If the legal portion of a bilateral bargain is severable, legal promises on two sides being apportioned to one another, and the illegal portion of the bargain does not go to its essence, the legal part may be enforced. If the illegal portion of the bargain is essential the difficulty in the way of recovery is insuperable. It is a violation of the terms of the bargain to compel either party to perform a fraction thereof or to be subjected to damages for so doing.

See also, 6 Williston, Contracts, §§ 1780, 1782 (rev. ed. 1938).

And so in this case, assuming the condition to be illegal, it is inescapably essential to the bargain, for it is the express condition upon it. As such, there is an insuperable barrier to conferring the grant while dispensing with the condition. Both are indispensable to the contract.

The situation thus comes down to this: Under the contract existing when he transferred from the maintenance department, Frazier had only one year's departmental seniority, and that manifestly did not suffice to entitle him to return to the department to displace an employee with ten year's departmental seniority. Frazier could increase his seniority standing only in reliance upon the agreement existing when he sought to return to the department. But acquisition of any additional seniority under the terms of the later agreement was expressly conditioned upon a proviso the requirements of which Frazier did not meet. And Frazier's seniority status remains unimproved whether the proviso is valid or invalid. If valid, Frazier's status is obviously unimproved; if invalid, his status is still unimproved, for if the proviso does not stand, no improvement of status can be predicated upon a grant the

essential condition of which has been destroyed. Under either alternative, therefore, Frazier takes nothing from the later agreement. Accordingly, Frazier could not have been discriminatorily deprived of his right to return to the maintenance unit upon his layoff as a timekeeper, for he had no such right.

3. Even if the right under the later agreement to "retain and accumulate" departmental seniority is severable from the withdrawal card condition, Frazier still did not have sufficient seniority to return to the maintenance unit, for the employee within the unit whom he was to displace had greater seniority than Frazier. That employee had at least ten year's departmental seniority (*supra*, p. 4). We now show that at best Frazier had departmental seniority of seven years and three months.

As stated, the agreement existing when Frazier was laid off as a timekeeper provided in part that "Any employee who has been or is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall retain and accumulate his departmental seniority . . . " (*supra*, p. 3). This provision was first agreed upon in 1952 (*supra*, pp. 2-3). It applied to a person in Frazier's class, for it extended to any employee who "has been" promoted. Such an employee, the provision specified, "shall retain and accumulate his departmental seniority." As Frazier had one year's departmental seniority upon his original transfer from the unit, it was that one year that he was to retain.

The remaining question pertains to accumulation of seniority, more specifically, the date from which accumulation is to run. The critical words are "shall . . . accumulate." For a person in Frazier's position, there are two alternatives only: (a) accumulation is to begin in 1952, when the grant was first made, or (b) accumulation is to antedate the grant and thus to begin to run from Frazier's original transfer from the unit in January 1947. The first alterna-

tive is the correct interpretation. The words "shall . . . accumulate" bespeak futurity. Furthermore, prospective effect is in principle ordinarily preferable. Prospective accumulation maintains the existing relative seniority standing among the affected complement of employees *vis-a-vis* one another; retroactive accumulation disrupts the existing relative standing by jumping one or more employees over others in the affected group. The serious consequences flowing from increasing or decreasing seniority standing cautions against implying retroactive accumulation which is not in terms conferred. Accordingly, the period for accumulating seniority begins to run from 1952, the date of the grant.

On this basis, Frazier began to accumulate departmental seniority in 1952, and thus had six years and three months of accumulated departmental seniority at the time of his layoff as timekeeper on March 31, 1958. To this six years and three months of accumulated seniority is to be added one year of retained seniority for a total of seven years and three months of departmental seniority. This is two years and nine months short of the ten years of departmental seniority held by the employee then working within the maintenance unit whom Frazier was to displace. Frazier did not, therefore, have the requisite seniority entitling him to return to the maintenance unit.

4. The underlying dispute in this case is in reality a controversy between Frazier and the employee he was to displace. At stake was a maximum period of four month's employment before the shut down of the plant caused the termination of all existing personnel (*supra,* p. 2). In equity, the employee then holding the job, and who had worked at that or another job within the maintenance department for ten years, would seem to have a superior claim to the employee who had been out of the department for more than ten years, and who had worked in the department for no more than a year (*supra,* p. 3). At the

least there is no *a priori* basis for preferring the aspirant for the job to the holder of it. Both could not have the same job, and as between the two, there is surely nothing in the Act which commands a choice in favor of the aspirant. Yet the consequence of enforcing a back pay order against the Union in favor of the aspirant is to say that it was the Union's duty under the Act to prefer him to the incumbent. That is not the law.

III. THE PROVISION OF THE AGREEMENT CONDITIONING RETENTION AND ACCUMULATION OF SENIORITY WHILE OUTSIDE THE UNIT UPON THE WITHDRAWAL CARD REQUIREMENT IS NOT INVALID AS DISCRIMINATION IN EMPLOYMENT ENCOURAGING UNION MEMBERSHIP

We have shown under Point I that the cease-and-desist parts of the order, and the corresponding parts of the notice, are moot and cannot therefore be enforced (*supra*, pp. 10-12). We have shown under Point II that the back pay part of the order, and necessarily the corresponding part of the notice, cannot be enforced because Frazier was not entitled to displace the employee filling the job and is therefore not entitled to back pay for being denied the job (*supra*, pp. 12-22). This fully disposes of the whole of the order and renders further inquiry supererogatory. Courts of course do not adjudicate academic or hypothetical issues, nor determine more than is necessary to decision.

Nevertheless, upon the assumption that our arguments under Points I or II may not be accepted, we proceed to show the validity of the withdrawal card condition upon the retention and accumulation of seniority by an employee transferred from the unit. A *caveat* should be stated at the outset. The provision pertains to the position of "Foreman, Assistant Foreman or Timekeeper." The provision was applied in this case to a timekeeper. This is a nonsupervisory position. Our argument upon the validity of the provision is geared to the nonsupervisory status of the job of timekeeper. On the other hand, the positions of

foreman and assistant foreman are supervisory. The statute "excepts foremen from the protection of the Act." *Carpenters District Council* v. *N.L.R.B.*, 44 LRRM 2457, 2458 (C.A.D.C., July 9, 1959). The validity of the provision as it pertains to supervisors raises important additional considerations not relevant to nonsupervisors. *Cf.*, *Texas Co.* v. *N.L.R.B.*, 198 F. 2d 540 (C.A. 9). Accordingly, should the Court reach it at all, the issue as to the validity of the provision in this case is confined to its application to nonsupervisory positions.

1. The Board found the provision to be invalid upon the basis of two factors: (a) "Because . . . only union members are eligible to obtain withdrawal cards such a clause . . . discriminated in favor of union member employees" (J.A. 5); (b) "the provision inherently encourages members to remain members" (J.A. 5, n. 1). The critical importance of these two factors in the Board's analysis is best discerned by relating them to the relevant statutory provisions to which they are addressed.

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . ." Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." The crux of the prohibition therefore is encouragement or discouragement of union membership by discrimination in employment. As the Supreme Court has explained (*Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 42-43):

> The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination

> is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

And it is clear that "Congress intended the employer's purpose in discriminating to be controlling" (*id.* at 44), although "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership" (*id.* at 45). As explained by Judge Learned Hand concurring in *N. L. R. B.* v. *Business Machine Board*, 228 F. 2d 553, 561 (C.A. 2), cert. denied, 351 U.S. 962:

> . . . the Court in that case [*Radio Officers*] did not say that the employer's motive was not crucial in deciding whether he had "discouraged" joining the union; but it did say that a special finding as to his motive was not essential. So it seems to me that the upshot of the decision is that, if the evidence is strong enough, the court may conclude that, although the Board did not so find, no other finding was possible, and the case may be disposed of as though the finding has been made. I cannot otherwise account for the fact that motive was held to be critical, and yet that a finding of motive was unnecessary.

2. We may assume that to condition the grant of seniority upon acquisition of a withdrawal card adequately establishes discrimination in employment based on lack of union membership. But absent is the necessary companion finding that the Company's motive was to encourage union membership. The Board merely states that "the provision inherently encourages members to remain members" (J.A. 5, n. 1). This is not a finding of motive. Nor can it be said that the Company's concurrence in the provision is explicable only on the basis that its aim was to encourage union membership so that a finding is not essential. The provision was first adopted in 1952. There is no evidence as to whether the provision was proposed by the Company or the Union, what modifications (if any) the proposal underwent before adoption, or what reasons were ad-

vanced in favor of or in opposition to the provision. Any finding of motive must be drawn exclusively from the face of the provision. To say from the face of the provision that the Company acted from a motive to encourage union membership rather than other reasons is to engage in a sheer guess. For ought that appears the Company may have been indifferent to the provision and accepted it as part of the give-and-take of collective bargaining simply because the Union wished it. Whatever the reason, the least probable explanation is that the Company's action was motivated by a desire to encourage union membership. In short, from the face of the provision only surmise as to the Company's true motive is possible. But evidence "must do more than create a suspicion of the existence of a fact to be established." *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300.

3. Assuming that *Radio Officers* is properly to be read as meaning that the employer's actual motive is irrelevant "where a natural consequence of his action was such encouragement or discouragement" of union membership (347 U.S. at 45), the Board's position is no better. In the circumstances of this case the natural and foreseeable consequence of adoption of the provision is that it would have no effect to encourage union membership. The provision was adopted in 1952 (*supra,* pp. 2-3). The Union had been recognized as the exclusive bargaining representative since March 12, 1946 (*supra,* p. 2). Throughout the entire period of its incumbency all employees who worked within the maintenance unit were members of the Union (*supra,* p. 6). Thus membership in the Union was universal for the period of five years and nine months preceding the adoption of the provision. Since unanimous union membership existed without the provision, it can hardly be said that its adoption would effectively contribute to encouraging union membership. What was truly natural and foreseeable is that the provision would have an indifferent influence upon it. A condition created and maintained with-

out the provision would continue to exist with or without the provision.

The Board states merely that "the provision inherently encourages members to remain members" (J.A. 5, n. 1). But since the employees had remained members for five years and nine months without the provision, nothing inhered in the provision which would bring about a result which was not already fully manifest without it. Indeed, since the agreements had uniformly provided that all employees who are or become members of the Union "shall, as a condition of employment, maintain their membership in the Union in good standing for the duration of this Agreement" (*supra*, p. 5), once an employee did become a member he was willy-nilly obliged to remain a member. The provision could not "inherently" encourage the employees to remain members when that was in any event their obligation.

3. We have shown that neither the employer's purpose, nor the natural and foreseeable consequence of adoption of the provision, was to encourage union membership. This is true without regard to the union security clause of the agreement, and is *a fortiori* true when the true purport of the union security agreement in this case is taken into account.

A union security agreement typically takes one of two forms, either union shop or maintenance of membership. A union shop provision requires that the employee, within thirty days of employment or the effective date of the agreement whichever is later, shall become and remain a member of the union as a condition of employment; a maintenance of membership provision leaves an employee free not to become a member, but provides that, if he is or chooses to become a member, he shall retain his membership as a condition of employment.

The Board found that the union security agreement in this case was of the maintenance of membership variety

(J.A. 5). On this basis the Board apparently concluded that, since the employees were not otherwise obligated to become members, the seniority provision could operate to encourage them to become members. We have shown that this conclusion is erroneous even if the Board correctly construed the union security agreement to embrace only maintenance of membership (*supra,* pp. 23-26). We now show that the union security agreement was in fact of the union shop variety. In consequence, since the employees were obligated to become members, the seniority provision could not be said to encourage what was in any event compelled.

It is true that in terms the union security agreement provided only for maintenance of membership. But in practice the agreement had been transformed into a union shop provision. That is manifest from the uncontroverted testimony of the Company's assistant to the operations manager, the official who represented the Company in its dealings with the Union (J.A. 49):

> There is a clause, after 30 days it is necessary they belong to the union. You hire them and right after 30 days they become members.

And this understanding was cogently reflected in the unanimous union membership of the employees in the Union throughout the period of its status as the exclusive bargaining representative (*supra,* p. 6). In this situation, for the Board to rely upon the words to the exclusion of the transforming character of the practice and understanding, and to find a provision for maintenance of membership only where in fact a union shop existed, is to repeat the error laid bare by the Court of Appeals for the Ninth Circuit in *N.L.R.B.* v. *Scientific Nutrition Corp.,* 180 F. 2d 447, 449:

> We are persuaded that this concentration on the terms of the writing led the Board to overlook or disregard material and uncontroverted evidence tending to show

that Capolino [the employer] and Local 22382 had long understood and administered their contract as requiring membership in the Local as a condition of employment. The testimony of Capolino's plant superintendent, McIsaacs, in charge of labor relations, is directly to the effect that with the exception of certain employees occupying a supervisory or other status not covered by the contract all employees, as McIsaacs understood the agreement, were required to maintain good standing in the union as a condition of employment. Nowhere in the record does it appear that this interpretation of the contract had at any time prior to May 1945 been questioned by anybody. Cedar himself [the discharged employee], who had been a regular employee of Capolino for at least a year, testified as a Board witness that until May 18, 1945 all employees of Capolino were members in good standing of Local 22382, and that he did not know of any employee prior to that date who failed to maintain membership therein. Asked whether such maintenance of membership had not at all times prior to that date been treated as an absolute requirement, Cedar replied merely that he did not know.

* * *

On the present record it is not irrational to assume that an informal understanding of that sort had early been arrived at between Capolino and the Local. We gather that respondent's plant was a small one. At the time of the occurrence related above it appears to have had not more than 26 employees. In an operation so small, and where all employees are union members, an informal stipulation that union membership is a requisite of employment would seem to be a natural development of the relationship. The Act, it is to be remembered, does not require contracts between employer and the union to be in any particular form, or that they be reduced to writing. Compare *United Fruit Co.*, 12 N.L.R.B. 404. If the practice here were the result only of a mutual interpretation of the formal written document, without more, the result would not be different.

CONCLUSION

For the reasons stated the Board's order should be set aside.

Respectfully submitted,

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APPENDIX A

The following constitute the references to the transcript of record designated "Tr." in the brief and which were not printed in the Joint Appendix:

Cecil Frazier

Cross Examination

* * * * * * * * * *

42 Q. I am trying to get to the fact prior to the time that the company acquired this plant, Mr. Frazier, you worked as a molder, is that correct? A. I didn't work for Auto-Lite as a molder.

Q. You worked for Porter? A. That's right.

Q. In 1946, and do you recall what date the company acquired that plant? A. I cannot recall the exact date, it was in January.

Q. You were reclassified and assumed the work as machinists is that correct? A. That is right.

Q. And is that the classification you held until your transfer out of the bargaining unit? A. That's right.

* * * * * * * * * *

56 Q. When did you first discover your seniority would apply under the terms of this agreement, Mr. Frazier? A. Under the terms of the agreement, when I went on salary basis, my seniority was covered, by the contract.

* * * * * * * * * *

Wayne Bennett

Direct Examination

* * * * * * * * * *

72 Q. Were you employed by the Electric Auto-Lite Company, Mt. Vernon Division? A. Yes, sir.

Q. When were you employed by that company? A. I transferred to Mt. Vernon from the Fostoria Plant in June of 1954.

Q. How long did you work in Mt. Vernon? A. Until such time as they ceased operations.

Q. That was July 31, 1958? A. Right.

Trial Examiner: Just to make it perfectly clear,
73 the company is not operating the plant in Mt. Vernon now, is that correct?

The Witness: Right.

* * * * * * * * * *

Cross Examination

* * * * * * * * * *

97 Q. Did you have a job available for Frazier, at the time he was laid off, in the bargaining unit? A. Was there a job available?

Q. Yes. A. As long as his seniority rights were high enough, he could have work, yes.

* * * * * * * * * *

98 Q. You were willing to put him in as a general maintenance man? A. With his seniority, you don't have much choice.

Trial Examiner: Assuming he had seniority, is it?

The Witness: Yes.

* * * * * * * * * *

R. W. Munger

Cross Examination

* * * * * * * * * *

118 Q. The first knowledge you had that Frazier had not taken out a withdrawal card, was when he came to talk to you sometime in April of 1958? A. My first knowledge, it was told to me in about January.

* * * * * * * * * *

Q. Why didn't you use the present contract with regard to Frazier's seniority at that time? A. My statement from Mr. Frazier was on the latter part of March, he

119 didn't come under the direction of our present contract.

* * * * * * * * * *

121 Redirect Examination

Q. (By Mr. Slaight) You say you informed Mr. Fraizer that he didn't qualify under the requirements of the present contract, is that right? A. Right.

Q. That was the requirement that a man obtain a withdrawal card, isn't that right? A. To keep his seniority, yes.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), are as follows:

* * * * * * * * * *

Sec. (8) (a) It shall be an unfair labor practice for an employer—

* * * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

* * * * * * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *.

* * * * * * * * * *

REPLY BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

For the District of Columbia Circuit

FILED DEC 14 1959

Joseph W. Stewart

CLERK

No. 15,175

LOCAL LODGE NO. 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside and on Request to Enforce an Order of the National Labor Relations Board

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On Petition to Review and Set Aside and on Request to Enforce an Order of the National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

I. THE CEASE-AND-DESIST PROVISIONS OF THE ORDER, AND THE CORRESPONDING PROVISIONS OF THE NOTICE, ARE MOOT

1. In contending that "the fact that the plant closed in July 1958" does not moot the cease-and-desist parts of the order, the Board brief asserts that the "record . . . does not establish that the closing was 'permanent' " (Bd. br. p. 11).

The finding is that a "*final* shutdown of plant activities" took place on July 31, 1958 (R. 15, emphasis supplied), and that the "Company *no longer operates* its Mt. Vernon plant . . ." (J.A. 17, emphasis supplied). The stipulation which underlies the finding is that (J.A. 24):

> Mr. Papps [counsel for the Union]: I'd like to stipulate with counsel, that the company closed the plant, *permanently closed* the plant about September 1, 1958. [Emphasis supplied.]
>
> * * *
>
> Mr. Slaight [counsel for the General Counsel]: I will stipulate this plant was closed on July 31, 1958.

Every succeeding reference in the record to the plant shutdown does not detract from, but confirms, the permanent character of the closing (J.A. 49, 57, Tr. 72-73).

The Board brief would have it, however, that when counsel for the Union proposed a stipulation that the plant was "permanently closed" and counsel for the General Counsel stated "I will stipulate this plant was closed," the "ultimate stipulation was confined to the fact of closing" and not its permanence (Bd. br. p. 11). The notion that counsel for the General Counsel was engaging in a sly subtraction from the intent of the proposed stipulation is a newly introduced thought. There is nothing in the findings or the record to suggest that counsel for either party or the trial examiner understood the stipulation to embrace less than a permanent shutdown. And to assume that counsel for the General Counsel meant to stipulate to less than was proposed, without affirmatively disclosing that intention, is to impute to him a type of sharp practice that we should not lightly infer.

In the event that it be thought that the findings and record do not show a permanent closing of the Mt. Vernon plant, we have moved the Court to remand the case to the Board to take additional evidence upon the question of the permanence of the plant closing. We have annexed to the

motion an affidavit incorporating a letter dated September 5, 1958, from the Vice-President and Director of Industrial Relations of the Company to the Regional Director of the Fourteenth Region of the National Labor Relations Board, the region in which this case arose, a copy of the letter having been sent to the Union and others. This letter from the Company's officer to the Regional Director states in part that:

> This Company wishes to acknowledge receipt of the complaint and notice of hearing in the above captioned case. It is noted that the charge was filed on the 16th of April, 1958. This is to advise you that since the filing of the charge, *all of the manufacturing operations of the Company at the Mt. Vernon Foundry have been discontinued, the plant has been dismantled and is now on the market for sale and all of the former employees of the Company appearing on the seniority lists of Local 1417, International Association of Machinists, AFL-CIO, including Cecil Frazier, have been terminated.* [Emphasis supplied.]
>
> In view of the foregoing it appears to the writer that the question is moot and that no useful purpose will be served by further proceedings in this case. It is suggested, therefore, that this proceeding be discontinued and the hearing now scheduled for September 23 be cancelled.

And another affidavit appended to the motion states that:

> The Electric Auto-Lite Company has not reopened the plant at Mt. Vernon, Illinois, subsequent to its closing on July 31, 1958. Instead, the Electric Auto-Lite Company sold the plant to E. V. Berry, president of Precision Engineering Company. The plant and building, formerly owned by Electric Auto-Lite Company, have been and remains unused and unoperated for the entire period of ownership by Precision Engineering Company. Precision Engineering Company has no connection with Electric Auto-Lite Company. The operations formerly conducted by Electric Auto-Lite Company at the Mt. Vernon plant have been

consolidated by Electric Auto-Lite Company with its operations at its foundry at Fostoria, Ohio, and the employees at the Fostoria foundry are not represented by Local 1417, or any other affiliate of the International Association of Machinists.

2. A second ground advanced for contending that the cease-and-desist parts of the order are not moot is that the "record is also silent as to whether the Union has dealings with the Company at any other plant" (Bd. br. pp. 11-12). This contention is premised on the unarticulated assumption that the order has, and validly can have, a scope for operation outside the Mt. Vernon plant. The assumption is baseless.

(a) The caption of the complaint (J.A. 58), the intermediate report (J.A. 9), and the Board's decision and order[1] all identify the Company as "The Electric Auto-Lite Company, *Mt. Vernon Foundry Division.*" (Emphasis supplied.) All the events of record, and the agreements at issue, are limited to the Mt. Vernon plant. Other plants of the Company are therefore not relevant, for the order arises from, and is confined to, the Company's operation of its plant at Mt. Vernon.

(b) Had the Board extended the order beyond the Mt. Vernon plant, the extension would be invalid. There is no showing that the Union represents employees of the Company at any other plant; or that the agreements the Union is not shown to have, at plants it is not shown to represent, contain any provisions identical with or similar to the provision found invalid in this case. All that the record discloses is a particularized controversy at a single plant with not the slightest intimation of any ramifications outside it. In these circumstances there would be no valid foundation for extending the scope of the order beyond the plant at

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[1] While the caption to the decision and order is not reprinted in the joint appendix, it is identical with that in the intermediate report which is reprinted (J.A. 9).

which the controversy took place.[2] To construe the scope of the Board's order as the Board brief would is to impute to it a freewheeling character which this and other courts have condemned.[3]

(c) The very phrasing of the contention in the Board's brief discloses its invalidity. It reads (Bd. br. pp. 11-12): "The record is also *silent* as to whether the Union has dealings with the Company at any other plant" (emphasis supplied). It is upon the basis of what a record shows, not upon what it does not show, that an order has to be based. A decree cannot be entered to enforce an order based on the speculation that facts not shown to exist may exist.

3. The Board brief would differentiate the Eighth Circuit's decision in *N. L. R. B.* v. *Grace Company*[4] and the Fifth Circuit's decision in *N. L. R. B.* v. *Reynolds Corporation*[5]—that permanent plant closure moots *in futuro* orders—upon the basis of dubious distinctions not relevant to the rationale of the decisions (Bd. br. pp. 12-13). And the decisions cited by the Board brief to support a contrary view are quite beside the point (Bd. br. p. 12).

Thus, in *Walling* v. *Haile Gold Mines,* 136 F. 2d 102, 105 (C.A. 4), the operation was "temporarily closed" and there was an "admitted likelihood of . . . resuming" it; the "possibility of future violations" was "very much"

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[2] *N.L.R.B.* v. *Ford Motor Co.,* 119 F. 2d 326, 330-331 (C.A. 5); *Reliance Mfg. Co.* v. *N.L.R.B.,* 125 F. 2d 311, 321-322 (C.A. 7); *Shell Oil Co.* v. *N.L.R.B.,* 196 F. 2d 637, 639 (C.A. 5); *N.L.R.B.* v. *Jack Smith Beverages, Inc.,* 202 F. 2d 100, 102 (C.A. 6), cert. denied, 345 U.S. 995; *N.L.R.B.* v. *F.H. McGraw and Co.,* 206 F. 2d 635, 641 (C.A. 6).

[3] *International Brotherhood of Teamsters* v. *N.L.R.B.,* 262 F. 2d 456, 462-463 (C.A.D.C.); *N.L.R.B.* v. *Local 926, International Union of Operating Engineers,* 267 F. 2d 418, 420-421 (C.A. 5).

[4] 184 F. 2d 126, 130-131, 189 F. 2d 258.

[5] 155 F. 2d 679, 681-682, 168 F. 2d 877.

present "and not merely within the realm of prophecy."[6] In this case, on the contrary, the plant has been permanently closed.

The other case cited in the Board brief—*Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331, 334-335 (C.A. 8)—presented an instance where, during the pendency of an appeal, the corporate defendant had been dissolved as a result of liquidation in bankruptcy. Applicable to this situation is the rule that since the judgment may, "in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons," the "vitality of the judgment in such a case survives the dissolution of the corporate defendant." *Walling* v. *Reuter*, 321 U.S. 671, 674. For in such a case, while dissolution of the corporate defendant "precludes enforcement of the judgment against it," it "does not foreclose" its assertion "against such other persons as may be bound by the judgment." *Id.* at 676. In this case, on the contrary, it is not a question of the dissolution of the party against whom the judgment is sought, but the disappearance of the subject matter upon which the judgment can operate at all. Both the Fifth Circuit in *Reynolds* and the Eighth Circuit in *Grace* explicitly recognized the distinction, the Fifth Circuit stating that permanent plant closing differed from the situation of an employer who "has gone out of business, where there may be a successor who would privy bound by the order" (155 F. 2d at 681), and the Eighth Circuit similarly differentiating the situation "in which the employer is succeeded by another bound by the Board's order" (184 F. 2d at 131). Indeed, since it was the Eighth Circuit which decided *Mutual Wholesale* and later decided *Grace*, it would at least be surprising were it truly to have implicated itself in contradictory dispositions.

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[6] Certain *obiter* in the opinion, but not the decision on the facts disclosed, seems flatly in conflict with *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116.

In short, in this case, the crucial fact is that there is "no longer a subject matter on which the judgment . . . could operate." *St. Pierre* v. *United States,* 319 U.S. 41, 42.

Finally, even accepting the contention in the Board brief in its most uncritical form, it is not applicable in this case. For, it is claimed, it is the occurrence of the mooting event "'*after* the institution of legal proceedings against the defendant by a public agency [that] does not render the controversy moot'" (Bd. br. p. 12, emphasis supplied). But, in this case, the plant permanently closed on July 31, 1958, and while the charge was filed before then, the complaint was not issued until August 26, 1958 (J.A. 9). Thus, the plant was closed *before, not after,* the complaint was filed. And it is the complaint filed *by* the Board, not the filing of the charge *with* the Board, which constitutes "the institution of legal proceedings" by the Board as "a public agency."[7] Accordingly, the Board brief can hardly successfully invoke a contention based on occurrence of the mooting event *after* the institution of legal proceedings by the Board, when in this case the mooting event occurred *before* then.

4. The last argument in the Board brief is this: Should the Board prevail in securing enforcement of the back pay part of the order, the Court will necessarily have to pass upon all the substantive contentions also relevant to enforcement of the cease-and-desist parts of the order, and there is hence no reason to withhold entry of a decree enforcing the order's *in futuro* provisions (Bd. br. p. 13). This quite misconceives the basis for the exertion of judicial power. Since the "purpose of an injunction is to prevent future violations" (*United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633), the erasure of the subject upon which the

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[7] See *N.L.R.B.* v. *Fant Milling Co.,* 360 U.S. 301, 307-308; *N.L.R.B.* v. *Indiana & Michigan Electric Co.,* 318 U.S. 9, 18; *N.L.R.B.* v. *Fulton Bag & Cotton Mills,* 180 F. 2d 68, 71 (C.A. 10); *Kansas Milling Co.* v. *N.L.R.B.,* 185 F. 2d 413, 415 (C.A. 10); *N.L.R.B.* v. *Kingston Cake Co.,* 191 F. 2d 563, 567 (C.A. 3); *Consumers Power Co.* v. *N.L.R.B.,* 113 F. 2d 38, 42 (C.A. 6).

injunction can operate likewise nullifies any purpose to its entry. To refrain "from entering an empty decree" (*Mitchell* v. *Chambers Const. Co.*, 214 F. 2d 515, 517 (C.A. 10)) is not only the right but the duty of a court. And this right and duty also serve to answer the slur in the Board brief that "the Union's only interest in pressing a review proceeding in which the mootness argument is its first contention appears to be to avoid a decree which could be operative if the plant reopened" (Bd. br. p. 13). Aside from both the immateriality of motive and the slur's disregard of the plain fact that the plant is permanently closed, overlooked is the obligation to tender an issue which goes to the jurisdiction of a court to exercise judicial power. See *United States* v. *Alaska Steamship Co.*, 253 U.S. 113.

II. INVALIDATION OF THE PROVISION OF THE AGREEMENT PERTAINING TO RETENTION AND ACCUMULATION OF SENIORITY BY EMPLOYEES TRANSFERRED FROM THE UNIT DOES NOT DESTROY THE ENTIRE SENIORITY STRUCTURE ESTABLISHED BY THE AGREEMENT

Under Point II of our brief we showed that, even if the provision of the agreement pertaining to retention and accumulation of seniority by employees transferred from the unit were invalid, this did not entitle Frazier to return to the maintenance unit and to displace an employee then working within the unit who had greater contractual seniority than Frazier (Pet. br. pp. 12-22). The Board brief answers that (pp. 6-7):

> The Union argues that if the seniority provisions requiring a withdrawal card are illegal, Frazier had no seniority rights whatsoever. But under this view *the man whom Frazier would have displaced likewise had no seniority rights,* and we are left with a case in which the Union's objection to Frazier's replacing the incumbent rests on Frazier's lack of Union membership, a plain violation of the Act. [Emphasis supplied.]

The notion that the incumbent "had no seniority rights" is predicated upon the assumption "that the *entire* seniority structure is destroyed by the invalid Union preference," that all "the seniority provisions are *entirely* vitiated" (Bd. br. p. 9, emphasis supplied).

The assumption that the entire seniority structure established by the agreement is destroyed by invalidation of the single provision pertaining to retention and accumulation of seniority by out-of-unit employees is based on a failure of analysis. The seniority of in-unit employees is separately established in the agreement from the retention and accumulation of seniority by out-of-unit employees (J.A. 61-62). The invalidation of out-of-unit seniority does not in the least affect the vitality of in-unit senority. The out-of-unit seniority provision can be wholly severed from the agreement without requiring so much as the change of a comma in maintaining the sense, spirit, and letter of in-unit seniority. Consideration of the seniority structure established by the agreement cannot conceivably lead to the conclusion that the "forbidden provision is so basic to the whole scheme . . . and so interwoven with all its terms that it must stand or fall as an entirety." *N. L. R. B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 78. In short, invalidation of out-of-unit seniority does not destroy in-unit seniority.

The Board brief fails to distinguish two separate situations. The first situation is presented by this case. To return Frazier to the maintenance department required the layoff of an employee then working within that department who had ten years' departmental seniority. The incumbent was granted that departmental seniority and protected from layoff out of seniority order by Sections 1 and 2(a) of Article V of the agreement (J.A. 61-62). Frazier's sole basis for a claim to displace the incumbent stemmed from Section 10(a) of Article V of the agreement (J.A. 62). Invalidation of Section 10(a) as discrimina-

tory does not invalidate Sections 1 and 2(a). The incumbent's job tenure continued at all times to be protected by the valid and nondiscriminatory provisions of Sections 1 and 2(a). Accordingly, since invalidation of Section 10(a) (Frazier's source of right to the job) does not invalidate Sections 1 and 2(a) (the incumbent's source of right to the same job), the incumbent and his Union could rightly resist displacing the incumbent from the job by any competitor for it who had less seniority than the valid and nondiscriminatory contractual seniority enjoyed by the incumbent.

The Board brief fails to distinguish the instant situation from a separate one not presented by this record and to which the contention in the Board brief would properly apply. Suppose there were a vacancy in the maintenance department to which two out-of-unit employees, A and B, both aspired. A had greater maintenance department seniority than B but had not obtained a withdrawal card upon transfer from the unit; B had obtained a withdrawal card. In the competition between these two for the vacancy, the invalidation of the provision pertaining to the retention and accumulation of seniority would destroy B's claim to superior standing under the agreement. To prefer B over A on the basis of the invalid provision would therefore show discriminatory selection. In this case, on the other hand, the contractual seniority which protects the incumbent from displacement by a competitor with lesser seniority has a valid and nondiscriminatory basis. The in-

cumbent does not invoke an invalid provision to establish his contractual right to the job.[8]

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December, 1959.

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[8] The failure of the Board to distinguish between personnel action based on seniority and not discrimination was recently illustrated in another context in *N.L.R.B.* v. *Wheland Co.*, 45 LRRM 2061, 2063 (C.A. 6, Oct. 29, 1959).

Two other matters may be briefly noted. (1) The Board brief suggests that Frazier complied with the withdrawal card condition by applying for although not obtaining a withdrawal card (Bd. br. p. 11, n. 4). The brief earlier and correctly noted that the agreement required that employees shall have "*received* withdrawal cards from the Union" (Bd. br. p. 6, emphasis supplied). The parties to the agreement recognized that it imposed the condition of obtaining a withdrawal card (Pet. br. pp. 4-5). And to assume that an application which is not granted satisfies the agreement is to construe it as requiring a meaningless formality. (2) Although not material even if true, it is appropriate to note that there is no finding or evidence to support the statement in the Board brief "that the Union threatened to strike if Frazier were returned to the unit. . ." (Bd. br. p. 8).

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15175

LOCAL 1417, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON REQUEST TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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United States Court of Appeals
for the
District of Columbia Circuit

FILED NOV 19 1959

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CLERK

STATEMENT OF QUESTIONS PRESENTED

The Board believes that the questions are as stipulated, J.A. 2, and does not agree with the petitioner's rephrasing of the issues. If the "identified issues" are to be further particularized, the Board believes the questions are:

1. Whether a union which enforces an agreement, under which only union members are permitted to accumulate seniority after leaving the bargaining unit, has violated Section 8(b) (1)(A) and (2) of the Act.

2. Whether a union by preventing the transfer of an employee into the bargaining unit, on the ground that he is not a union member in good standing, violates Section 8(b) (2) and (1)(A) of the Act.

3. Whether the shutdown of a plant requires the Court to dismiss as moot cease and desist provisions directed at an unlawful contractual arrangement, even though the concededly nonmoot portions of the order require the Court to pass upon all the substantive issues in the case.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Local 1417, International Association of Machinists, AFL–CIO, Mt. Vernon, Illinois, hereafter called petitioner or the Union, to review and set aside an order of the National Labor Relations Board issued on May 17, 1959, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*). In its answer to the petition the Board has requested enforcement of its order. The Board's decision and order (J.A. 4–19) [1] are re-

[1] "J.A." refers to those portions of the record printed as a joint appendix to the briefs pursuant to the rules of this Court and the pre-hearing stipulation of the parties. "Tr." refer-

ported at 123 NLRB No. 143. The Court has jurisdiction under Section 10 (e) and (f) of the Act.

I. The Board's findings and conclusions

Briefly, the Board found that petitioner had violated Section 8(b) (1)(A) and (2) of the Act by maintaining and enforcing a contract with the Electric Auto-Lite Company which gave preference to union members in retaining seniority rights, and by causing the company to refuse employment to one Cecil Frazier pursuant to this unlawful contract. The subsidiary facts on which this finding rests may be summarized as follows:

A. The contracts between petitioner and the Company

In 1946 Electric Auto-Lite Company, hereafter referred to as the Company, purchased a plant at Mt. Vernon, Illinois, where it thereafter engaged in producing castings and moldings for interstate commerce (J.A. 10; Tr. 41–42). In March 1946, the Company recognized the Union as the exclusive bargaining agent for the Company's employees in a unit comprising maintenance men, machinists and electricians (J.A. 11; 64–67). The 1946 contract, and all subsequent contracts between the parties provided for "maintenance of membership," i.e., employees in the bargaining unit who were Union members when the contract was executed were required to retain their membership (J.A. 11; 66–67, 62–63).

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ences are to the typewritten transcript. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

With respect to seniority the 1946 agreement and all subsequent agreements provided that seniority would be determined on a department-wide basis, and that after a reduction in force, seniority would govern recalls to employment (J.A. 11; 66). The 1946 contract also provided that "employees accepting positions as foremen or men assigned to special duties outside the scope of this agreement shall retain their seniority where they last held seniority rights" (J.A. 12; 66). In 1952, however, and in agreements subsequent thereto, this provision was changed to read as follows (J.A. 12; 52–53, 62):

> Any employee who has been or who is hereafter promoted to the position of Foreman, Assistant Foreman or Timekeeper and whom the Company deems necessary to demote, shall retain and accumulate his departmental seniority but not job seniority, *providing he applied for a withdrawal card from the Union at the time he was promoted.* [Italics added.]

No italics

The Union's constitution limits withdrawal cards to members in good standing (J.A. 12–13; 64).

Upon the foregoing facts the Board held that the Union violated Section 8(b) (2) and (1)(A) of the Act by maintaining and enforcing a contract which discriminated against nonmembers by permitting only union members to protect their seniority in the event of promotion out of the unit (J.A. 5).

B. The discrimination against Frazier

Cecil Frazier was one of the original employees of the Company in January 1946, having been employed at the same plant by the Company's several predeces-

sors in ownership for over 20 years (J.A. 14; Tr. 41–42, 54). Originally employed by the Company as a maintenance man, Frazier in January 1947, because of a physical disability, became a timekeeper (J.A. 14; 27–28, 51–52). While employed in maintenance, he was a member of the Union and within the bargaining unit; when he became a timekeeper he was outside the bargaining unit, but continued to pay Union dues until March 1947 (J.A. 14; 27–28, 32).

At the time of his transfer Frazier requested the Union to give him a withdrawal card (J.A. 28–29, 33–34). The Union advised him that it was not issuing withdrawal cards, but that his seniority in the department would be protected by the then existing contract under which men assigned outside the unit retained seniority regardless of Union membership (J.A. 33–34). Frazier continued to pay dues to the Union for a few months and then stopped, and the Union dropped him from membership in July 1947 because of dues delinquency (J.A. 14; 25, 32).

In 1952, after Frazier had been employed outside the bargaining unit for five years, the Union and the Company, as noted above, altered their contract to provide that an employee theretofore or thereafter promoted out of the bargaining unit could retain his seniority status only if he had applied for a withdrawal card from the Union at the time of promotion (J.A. 12; 62). In 1958 Frazier's job as timekeeper was abolished for economic reasons, and the Company decided to transfer him back to his old job within the bargaining unit, and discharge a junior employee (J.A. 14–15; 43, 44). When a Company official,

Wayne Bennett, so advised Roy Adams, chairman of the Union's Shop Committee, Adams replied that Frazier could not return to the unit and cause the layoff of another man "who has been paying dues for the past 10 or 12 years," and that the men would refuse to work with Frazier because he "was not a member in good standing" (J.A. 14–15, 47–48). As Bennett testified, "I was told point blank [by Adams], he [Frazier] was not a member in good standing," and could not be accepted into the unit because he did not have a withdrawal card (J.A. 48). Adams similarly told Frazier that he could not return to the bargaining unit because he lacked a withdrawal card (J.A. 29).

Frazier was laid off March 31, 1958 (J.A. 15; 30). On that date the Company advised him that it had work for him in the bargaining unit but was not transferring him there because of the Union's objections (J.A. 31, 38–39, 52). On July 31, 1958, the Company closed down operations at its Mt. Vernon plant (J.A. 17; 24).

On the foregoing facts the Board found that the Union, by maintaining and enforcing the illegal contract, caused the Company to discriminate against Frazier, and hence further violated Section 8(b) (2) and (1)(A) of the Act (J.A. 5).

II. The Board's order

The Board ordered the Union to cease and desist from giving effect to the provisions of any agreement with the Company which unlawfully discriminate in regard to seniority rights, from causing or attempt-

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ing to cause the Company to discriminate against employees, and from like or related invasions of the statutory rights of the Company's employees (J.A. 5–6). Affirmatively, the order directs the Union to make Frazier whole for loss of pay suffered by reason of the discrimination against him, and to post appropriate notices (J.A. 6–8).

SUMMARY OF ARGUMENT

The seniority agreement in this case provided that employees promoted out of the unit could retain seniority therein only if they received withdrawal cards from the Union. As such cards were available only to Union members, the agreement discriminated in favor of Union members in violation of the Act. Under the decision in *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, unlawful encouragement of Union membership is inherent in such an arrangement; the violation does not depend upon an evidentiary showing that the Company intended to encourage Union membership or that any particular employee was encouraged to become or remain a Union member.

The Union's conduct in preventing the employment of Frazier likewise violated the Act, for the Union's objection was bottomed upon his failure to hold a withdrawal card from the Union, i.e., to retain his membership in the Union. The Union argues that if the seniority provisions requiring a withdrawal card are illegal, Frazier had no seniority rights whatsoever. But under this view the man whom Frazier would have displaced likewise had no seniority rights, and we are left with a case in which the Union's objection

to Frazier's replacing the incumbent rests on Frazier's lack of Union membership, a plain violation of the Act.

The Union contends that the shutdown of the Mt. Vernon plant moots the provisions of the order directing the Union not to enter into or enforce unlawful agreements with the Company. The record does not disclose whether the shutdown is permanent or whether the Union deals with the Company at another plant. In any event, unlike the mootness cases on which the Union relies, the Court in this case must pass upon the merits of the case in dealing with concededly nonmoot portions of the order. As the Court cannot avoid passing on the issues, the sole effect of holding part of the case moot would be to permit the Union to repeat its conduct if the plant reopened. Under these circumstances, the Court should not dismiss the cease and desist provisions as moot.

ARGUMENT

I. The Board properly found that petitioner violated Section 8(b) (1)(A) and (2) of the Act by enforcing a contract which encouraged union membership by limiting seniority protection to union members

In *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, the Supreme Court held that when a union, acting as collective bargaining representative, obtains benefits for its own members which are denied to nonmembers, it violates Section 8(b) (2) and (1)(A) of the Act. See the discussion in that opinion of the *Gaynor* case, 347 U.S. at 34–38, 46–48. That simple, and indeed self-evident, proposition—that a contract which provides

benefits available to union members but not to nonmembers unlawfully encourages union membership and discriminates against nonmembers—controls this case. Under the contract, a Union member promoted out of the unit could retain his seniority, but a nonmember similarly promoted could not. Such disparate treatment is precisely what the Supreme Court condemned in the *Radio Officers'* case.

As Frazier was the direct victim of the unlawful contractual arrangement, the Board properly held that the Union further violated Section 8(b) (1)(A) and (2) in causing him to lose his job. The statements of Adams, the Union's shop committee chairman, establish that the Union threatened to strike if Frazier were returned to the unit, because he was not a member in good standing and lacked a withdrawal card. In making Frazier's lack of membership in good standing the basis for preventing his employment, the Union violated the Act as construed in the *Radio Officers'* case, *supra*. The Union's action cannot be defended on the basis of the seniority arrangement, for as noted above this arrangement itself gave unlawful preference to Union members. The maintenance of membership clause likewise affords the Union no defense, for Frazier maintained his Union membership while a member of the bargaining unit, and could not lawfully be compelled to maintain it when employed outside the unit. Cf. *N.L.R.B.* v. *Murphy's Motor Freight*, 231 F. 2d 654 (C.A. 3); *N.L.R.B.* v. *Int'l Union, UAW, CIO, Local 291*, 194 F. 2d 698, 701–702 (C.A. 7). The union-security agreement permitted by the exception to Sec-

tion 8(a)(3) of the Act (cf. *N.L.R.B.* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 694–695) permits agreements requiring Union membership as a condition of employment *within* the bargaining unit, but cannot be extended to require such membership when an employee is outside the bargaining unit and is not represented by the Union. See *Radio Officers*, 347 U.S. at 41.

In attempting to avoid the impact of the well-settled propositions set forth above, the Union in its brief advances various contentions to which we now turn.

In Point II of its brief (pp. 12–22) the Union argues that, even assuming the invalidity of the seniority provision, the Union did not violate the Act as to Frazier because, if the provision falls, his seniority rights fall with it. But this argument, we submit, arises from the misconception that the Board is enforcing Frazier's seniority right. Even if it be assumed that the entire seniority structure is destroyed by the invalid Union preference, the fact remains that the Company was prepared to put Frazier to work in the unit represented by the Union, and would have done so but for the Union's objection based on Frazier's lack of Union membership. In short, the Union's argument proves too much; for, if the seniority provisions are entirely vitiated, it had even less standing to raise Frazier's want of membership as an objection to the Company's proposal to transfer him and have him replace another employee. The question is not, as the Union puts it (Br. 22), whether the Union had a duty to prefer Frazier to the job incumbent. The question is

whether, when the employer sought to replace the incumbent with Frazier, the Union could lawfully object on the basis of Frazier's nonmembership. To this question the statute affords a categorical answer.[2]

The Union closes its brief (pp. 22–27) with an argument that the seniority clause was not unlawful because the record does not establish the Company's intent to encourage Union membership. A similar contention was laid to rest in the *Radio Officers* case, 347 U.S. 17 at 38, 45–46, 51–52. The Union seeks to distinguish that case by arguing that no encouragement of membership occurred here because all the employees were Union members, had been members prior to the execution of the discriminatory seniority clause, and had to be members pursuant to the contract. The short answer is that discrimination against Frazier actually occurred in this case, and similar discrimination could occur under this contract in any case in which an employee was refused a withdrawal card for want of good standing in the Union even though he could not be discharged therefor.[3] Under

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[2] The foregoing argument makes it unnecessary to consider the Union's theory (Br. 20–21) that, under the contract, Frazier had less seniority than the man he would have replaced. We note in passing that the Company's contemporaneous construction of the contract differed from that now advanced by the Union.

[3] Assume, for example, an employee who belonged to the Union and was then suspended from membership for failure to pay a fine. Such an employee would be refused a withdrawal card under the Union's constitution (J.A. 64, and see proviso to Section 8(b)(1)(A) of the Act), but could not be discharged from employment under a maintenance of membership or Union shop agreement. *Radio Officers*, 347 U.S. at

this contract membership in good standing would be encouraged precisely as in the *Radio Officers* case where two of the discriminatees were union members, 347 U.S. at 23–33, 39–42. To be sure in the instant case we are dealing with a union security agreement under which employees were required to pay dues, but the withdrawal cards were not conditioned solely on dues paying but also on payments of "fines * * * and special levies" (J.A. 64). Moreover, in Frazier's case he was entitled to a withdrawal card when he first applied for one,[4] and his subsequent dues "delinquency" occurred at a time when he was outside the bargaining unit and hence not obligated to pay dues. See *Murphy's Motor Freight, supra,* 231 F. 2d 654; *Local 291, supra,* 194 F. 2d at 701–702.

II. The Board's order is not moot

The Union contends that the cease and desist provision of the Board's order are moot, that only the back pay provision has vitality, and that the order and notice should be modified accordingly (Br. 10–12). This argument is grounded on the fact that the plant closed in July 1958. The record, however, does not establish that the closing was "permanent"; counsel for the Union sought to stipulate to that effect, but the ultimate stipulation was confined to the fact of closing (J.A. 24). The record is also silent as to

40–42; *N.L.R.B.* v. *Die and Tool Makers Lodge No. 113*, 231 F. 2d 298 (C.A. 7), certiorari denied, 352 U.S. 833.

[4] The fact that Frazier actually applied for a withdrawal card in 1947 establishes that he fulfilled all the requirements of the later agreement which speaks in terms of "applied for" a card, rather than "obtaining" a card (J.A. 62).

whether the Union has dealings with the Company at any other plant. Under these circumstances the Union, we submit, has fallen far short of carrying its burden of establishing mootness. Moreover, as the courts have recognized, "It is familiar law that the discontinuance of an illegal practice by a defendant (*either by going out of business or otherwise*) after the institution of legal proceedings against the defendant by a public agency does not render the controversy moot" (italics supplied). *Walling* v. *Haile Gold Mines,* 136 F. 2d 102, 105 (C.A. 4), and cases cited; *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331, 334–335 (C.A. 8).

The cases relied on by the Union do not detract from the above "familiar law." In *U.M.W.* v. *N.L.R.B.,* 87 App. D.C. 230, 184 F. 2d 392, 393, certiorari denied, 340 U.S. 934, the Board's order directed the parties to cease giving effect to a clause in a particular contract which had expired by its terms before the decision of the Court. In the instant case, the cease and desist provisions relate to future clauses, and are not limited to the contract in effect in 1958. In *N.L.R.B.* v. *Grace Co.,* 184 F. 2d 126, 130–131 (C.A. 8), the cessation of business affected the affirmative relief ordered by the Board, as well as the cease and desist order, and the Court took the view that the entire order should be set aside as impossible of performance. In the instant case the affirmative provisions of the order are not even arguably moot, and the Court must necessarily pass upon the substantive issues in the case. *Grace,* moreover, involved a bargaining order, the validity of which might be affected

by changed conditions when the plant reopened, whereas here the order is directed at an illegality apparent on the face of the contract. In the *Reynolds* case, 155 F. 2d 679, 681–682, 168 F. 2d 877 (C.A. 5), the Court did not dismiss the cease and desist provisions as moot until it also satisfied itself that the affirmative provisions should be dismissed.

If the Court in this case finds unlawful discrimination against Frazier, the Court will necessarily find the seniority clause unlawful. Having so found, the Court should, we submit, enforce the order of the Board. Enforcement of the cease and desist provisions can affect the Union only if it repeats its unlawful conduct. If the plant should reopen, the Board as a public representative is entitled to a decree barring resumption of the unlawful practice. Indeed, the Union's only interest in pressing a review proceeding in which the mootness argument is its first contention appears to be to avoid a decree which could be operative if the plant reopened. We submit that as the Court must necessarily pass upon the substantive issue, it should not separate out part of the order and hold it moot.

CONCLUSION

For the foregoing reasons we respectfully submit that a decree should be entered enforcing the order of the Board.

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